TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 324

THE VIRGINIAN RAILWAY COMPANY,
PETITIONER,

vs.

SYSTEM FEDERATION No. 40, RAILWAY EMPLOYEES DEPARTMENT OF THE AMERICAN FEDERATION OF LABOR, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 31, 1936.

CERTIORARI GRANTED OCTOBER 12, 1936.

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TRANSCRIPT OF RECORD

UNITED STATES OF AMERICA,
Eastern District of Virginia, ss:

At a District Court of the United States for the Eastern District of Virginia, begun and held in the Court House and Post Office Building, in the City of Norfolk, on the first Monday of May, being the sixth day of the same month, in the year of our Lord One Thousand Nine Hundred and Thirty-five.

Present: The Honorable Luther B. Way, Judge of the District Court of the United States for the Eastern District of Virginia.

Among other were the following proceedings, to-wit:

System Federation No. 40, Railway Employes Department of the American Federation of Labor, in its own right and as the actual and legally designated representative of all Machinists, Boilermakers, Blacksmiths, Sheet Metal Workers, Carmen, Coach Cleaners, and their respective Specialists, Apprentices, and Helpers in the employ of The Virginian Railway Company in the States of Virginia and West Virginia, E. J. Preston, individually, as System General Chairman and as General Chairman for the Machinists, Andy Duncan, individually and as General Chairman for the Boilermakers, W. S. Penturff, individually and as General Chairman for the Blacksmiths, W. M. Sarver, individually and as General Chairman for the Sheet Metal Workers, A. P. Wyatt, individually and as General Chairman for the Electricians, and P. L. Allen, individually and as General Chairman for the Carmen and Coach Cleaners,

In Equity
No. 329

against

The Virginian Railway Company.

BILL OF COMPLAINT

(2) Filed May 2, 1935.

(Style of Court and Title omitted.)

To the Honorable Judge of said Court:

System Federation No. 40, Railway Employes Department of the American Federation of Labor, and the following persons, officers of and in the said System Federation No. 40, to-wit: E. J. Preston, System General Chairman and General Chairman for the Machinists; Andy Duncan, General Chairman for the Boilermakers; W. S. Penturff, General Chairman for the Blacksmiths; W. M. Sarver, General Chairman for the Sheet Metal Workers; A. P. Wyatt, General Chairman for the Electricians, and P. L. Allen, General Chairman for the Carmen and Coach Cleaners; individually, and as the duly (3) elected and designated representatives of the members of the various crafts and local trade unions composing said System Federation No. 40, and as the actual and legally designated representatives of the machinists, boilermakers, blacksmiths, sheet metal workers, electricians, carmen and coach cleaners, and their specialists, apprentices and helpers in the employ of The Virginian Railway Company in the states of Virginia and West Virginia, respectfully bring this Bill of Complaint on behalf of themselves, on behalf of the members of the various crafts and unions of which System Federation No. 40 is composed, and in behalf of the machinists, boilermakers, blacksmiths, sheet metal workers, electricians, carmen and coach cleaners, and their specialists, apprentices, and helpers in the employ of The Virginian Railway Company in the States of Virginia and West Virginia, and on behalf of all such other persons as have an interest herein and may by proper proceedings become parties hereto against The Virginian Railway Company, a Virginia corporation, with its principal office and place of business in the City of Norfolk, County of Norfolk, Virginia, and thereupon complains:

I.

The complainant, System Federation No. 40, Railway Employes Department of the American Federation of Labor, (hereinafter sometimes called the "Federation") is a voluntary association; a federation composed of the system craft organizations of the International Association of Machinists, International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America, International Brotherhood of Blacksmiths, Drop Forgers and Helpers, International Brotherhood of Electrical Workers, Sheet Metal Workers International Association, and Brotherhood Railway Carmen of America, organized and existing among the shop craft employes of the mechanical department of The Virginian Railway Company. The system craft organizations, federated in (4) System Federation No. 40, Railway Employes Department of the American Federation of Labor are voluntary associations; federations composed respectively of the local lodges of the respective crafts of machinists, boilermakers, blacksmiths, sheet metal workers, electricians and carmen organized and existing among the shop craft employees of the mechanical department of The Virginian Railway Company.. The local lodges federated in the respective system craft associations are respectively voluntary associations of machinists, boilermakers, blacksmiths, sheet metal workers, electricians, carmen and coach cleaners, and their specialists, apprentices, and helpers in the employ of The Virginian Railway Company generally, and specifically in the states of Virginia and West Virginia. Said Federation was organized on April 28, 1934, at a convention of delegates representing a majority of the employees of the Mechanical Department of The Virginian Railway Company. In this connection the complainants say that the machinists, boilermakers, blacksmiths, sheet metal workers, electricians, carmen and coach cleaners and their specialists, apprentices, and helpers are those employees who are employed by the defendant Railway Company in its Mechanical Department, and engaged in the making, repairing, equipping, and maintaining of its instrumentalities for transportation, and are herein sometimes referred to as "Mechanical Department employees."

By reason of the fact that continuously since the date of its formation, to-wit the 28th day of April, 1934, the Federation has been duly authorized and designated by a majority of the five hundred fifty (550), or thereabouts, Mechanical Department employees of The Virginian Railway Company to represent them in all matters concerning them and relating to the establishment and application of agreements concerning rules, rates of pay, and working conditions, and all other matters, and more particularly by virtue of the fact that the National Media-
(5) tion Board, by a certification of September 13, 1934, in case No. R-5 before that Board did find and certify that the Federation was the duly authorized representative of said Mechanical Department employees of The Virginian Railway Company for the purposes aforesaid, the said Federation and its General Chairmen are now the representatives of the Mechanical Department Employees of The Virginian Railway Company, duly and legally authorized and designated by them to treat with The Virginian Railway Company in seeking to establish and maintain agreements concerning rules, rates of pay and working conditions, and for all other purposes under the Railway Labor Act or otherwise.

Accordingly the complainants bring this action on behalf of and as representatives of all of the members of said Federation, all of the members of the various local trade unions of which it is composed, and all the Mechanical Department employees of The Virginian Railway Company in the states of Virginia and West Virginia, and in behalf of all other persons who may elect to associate themselves with the complainants, as well as in behalf of all others who may be similarly situated, whether members of said Federation or not. The members of the complainant Federation, the other Mechanical Department employees in the employ of said The Virginian Railway Company, and the other and additional persons in whose behalf this suit is brought and who are not hereinabove specifically called by their names, number approximately five hundred and fifty (550), but the exact number and their identity are so subject to fluctuations and changes, by death or otherwise, that it would be practically impossible to make all of them parties by name, and it is impracticable to bring

all of them before the Court by name. All of the persons in whose behalf this suit is brought are engaged in the same general class of employment for the same employer, and form a general class of persons with a common and general interest in the subject matter of this (6) suit. The complainant Federation and the individual complainants mentioned by name herein fairly represent the rights and interests of those in whose behalf this suit is brought and prosecuted.

The complainant E. J. Preston is an officer of the complainant Federation and is System General Chairman thereof, and General Chairman for the Machinists; the complainant Andy Duncan is General Chairman for the Boilermakers; W. S. Penturff, complainant herein, is General Chairman for the Blacksmiths; the complainant W. M. Sarver is General Chairman for the Sheet Metal Workers; the complainant A. P. Wyatt is General Chairman for the Electricians, and the complainant P. L. Allen is General Chairman for the Carmen and Coach Cleaners; and each of the above is invested with all of the powers and authority of the office attributed to him, and with said General Chairman constitute the System Committee of the Mechanical Employees of The Virginian Railway Company who are members of the local lodges hereinbefore referred to. The individual complainants bring this suit on behalf of and as representative of all of the members of said Federation, all of the members of the local unions of which the same is composed, and of all of the Mechanical Department Employees of The Virginian Railway Company in the states of Virginia and West Virginia, and in behalf of all other persons who may elect to associate themselves with the complainants, as well as in behalf of all others who may be similarly situated, whether members of said Federation or not.

II.

Defendant, The Virginian Railway Company, is a corporation, organized and existing under and by virtue of the laws of the State of Virginia, with its principal office and place of business in the City of Norfolk, Norfolk County, Virginia, within the Eastern District of Vir- (7) ginia, and within the jurisdiction of this Honor-

able Court, and engaged in the business of a common carrier by railroad, and the owner and/or operator of The Virginian Railway, and the employer of all the persons in whose behalf this suit is brought and prosecuted.

III.

This is a suit of a civil nature, which arises under the Constitution and laws of the United States, particularly under the Act of Congress of May 20, 1926, and as amended June 21, 1934, (Public Act No. 442, 73d Congress), and commonly referred to as the Railway Labor Act, and the laws of the United States relating to interstate commerce, and is instituted pursuant to the provisions of the said Railway Labor Act and the laws of the United States relating to interstate commerce, and also under the general equity jurisdiction of this Court, by reason whereof this Court has jurisdiction of this suit.

IV.

On or about the 1st day of October, 1922, defendant, The Virginian Railway Company, formed an organization of employees in its mechanical department known as "The Mechanical Department Association of the Virginian Railway Company" (hereinafter called "Association"), and on the 15th day of November, 1922, entered into a written agreement with said Association, fixing the rates of pay, rules, and working conditions of all machinists, boilermakers, blacksmiths, sheet metal workers, electricians, carmen and coach cleaners, and their respective specialists, apprentices, and helpers employed in the Mechanical Department of said Railway. Thereafter said Association was recognized by the management of said Railway as the duly constituted representative of the machinists, boilermakers, blacksmiths, sheet metal workers, electricians, carmen and coach cleaners, and their respective specialists, apprentices and helpers employed in said Mechanical Department, in all conferences, negotiations and agreements effecting employ-
(8) ment conditions and grievances growing out of such agreements and in the interpretation of rules. Said Association was organized by the management of said railway company, and is what is commonly known as a "company union".

The complainants believe, and so aver, that said Association has never been the representative of the Mechanical Department employees of The Virginian Railway Company by free choice of the said employees. They further aver that the said Association for some time past, specifically since the 28th day of April, 1934, has not been the duly and legally constituted and designated representative of the Mechanical Department employees of The Virginian Railway Company under the provisions of the Railway Labor Act of 1926, or under the provisions of the Railway Labor Act as amended June 21, 1934. Nevertheless, since November 15, 1922, the said Association has been recognized by the management of The Virginian Railway Company, and, regardless of the facts hereinafter related, is now recognized by the said management as the duly constituted representative of the Mechanical Department employees employed by said The Virginian Railway Company.

V.

On the 28th day of April, 1934, at a convention of delegates representing the employees of the Mechanical Department of the Virginian Railway Company, System Federation No. 40, Railway Employes Department of the American Federation of Labor, was organized, and the following named officers duly elected:

E. J. Preston, President.

E. L. Belcher, Secretary-Treasurer.

E. J. Preston, System General Chairman and General Chairman for the Machinists.

Andy Duncan, General Chairman for the Boilermakers.

W. S. Penturff, General Chairman for the Blacksmiths.

W. M. Sarver, General Chairman for the Sheet Metal Workers.

W. P. Wyatt, General Chairman for the Electricians.

P. L. Allen, General Chairman for the Carmen and Coach Cleaners.

Thereafter System Federation No. 40 became active (9) in the interests of its members, and in the interests of the members of the local trade unions of which it is

composed, all of whom are employed in the Mechanical Department of the Virginian Railway Company, to secure for them an agreement covering rates of pay, working conditions, etc., as they were justly entitled to, and since said date has been continuously so active in endeavoring to represent said employees in all negotiations with defendant Railway Company, to secure recognition by the management, and in all proceedings before the National Mediation Board.

Whereupon, and after the complainant Federation became active in the interests of its members and the Mechanical Department employees of The Virginian Railway Company, as aforesaid, the defendant, The Virginian Railway Company, at a date unknown to the complainants, but well known to the defendant, unlawfully interfered with, influenced, and coerced the Mechanical Department employees of The Virginian Railway Company in such manner as to cause them to withdraw their membership from the Federation and/or to withdraw from it their authorization to represent them.

In furtherance of said undertaking and for the purpose of interfering with, influencing, and coercing said employees, one J. W. Sasser, Superintendent of Motive Power, acting for and in behalf of said defendant Railway Company, issued a "Statement to the Members of the Mechanical Department Association of The Virginian Railway Company on Employee Representation", which statement was printed and widely circulated among employees in said Mechanical Department. Said statement in part declared:

"Let it be understood at the outset that the Management of The Virginian Railway Company is in no sense opposed to the principle of collective bargaining, and has practiced it for years. It not only accepts the principle and entirely approves of it, but does not believe that any dispute can be settled with the same degree of success or of satisfaction where one side of the controversy has no interest in the property and has no familiarity with the problems involved, which only an employee can have.

"Recent persistent efforts of the American Federation

(10) of Labor seeking authorization from members of the Mechanical Department Association of The Virginian Railway Company to represent the members in future conferences with representatives of The Virginian Railway Company, makes it necessary for the Management to present to its employees who will be affected a plain statement of facts in connection with the proposed change. Before the members of that Association shall act each member owes it to himself that he should give due consideration to some of the facts involved in the proposed change from Company Employee Representation to National Organization Representation. When such consideration has been given, the employees and members of that Association are entirely free to exercise their choice of representatives, free from fear or favor from their employer.

"Since its organization in 1922 the Mechanical Department Association of The Virginian Railway Company has, in pursuance of its agreement which has stood the test of years, worked out without friction all questions that have arisen between them. The relations between the Company and the members of the Association are harmonious and the arrangement has proved satisfactory. The mutual acquaintance of representatives of the employees and of the management, the knowledge of the property and the interest of the men in it creates a condition which is most desirable. None can fail to appreciate the seriousness of changing a condition which has proved so satisfactory in the past.

"It will hardly be denied by any of its members that the chief object of the American Federation of Labor is eventually to bring about the closed shop in industry, thereby regimenting labor and reducing the individual to a mere cipher with little or no influence in the management of his local Association.

"On July 1, 1922, practically all of the Mechanical Department employees of The Virginian Railway Company affiliated with System Federation No. 40, Railway Employees Department, American Federation of Labor, went on strike. This action resulted from a strike order issued by the executives of the organizations comprising

the Federated Shop Crafts. This course, as is well known, proved disastrous to the organizations and unfortunate to the men composing them.

"On July 3, 1922, the U. S. Railroad Labor Board issued a circular suggesting that the employees remaining in the service and the new employees succeeding those who left the service take steps as soon as practicable to form such an Association or Organization as might be deemed necessary to function in the Representation of the employees before the Board In line therewith, on October 1st, 1922, the shop employees of The Virginian Railway Company organized the Mechanical Department Association, with which all past negotiations pertaining to rates of pay, rules and working conditions, have been conducted. For the past year an attempt has been made to discredit in every manner this Association (commonly called Company Union) by professional representatives of organized labor in an effort to have its mem-
(11) bers authorize the Railway Employees Department, American Federation of Labor, to represent them in negotiations with the Railway Company rather than the Mechanical Department Association, which has represented them successfully for the past twelve years. And it has come to the attention of the Management that as an inducement for representation by American Federation of Labor promises of increased rates of pay and other matters have been made that cannot be fulfilled. Prior to the strike of 1922 there was continued dissention that frequently resulted in strikes without a single benefit, but did result in great loss of wages to the employees. For twelve years perfect harmony has prevailed. There have been no strikes and disputes have been promptly adjusted with satisfaction. It will be recalled that the Management in its negotiations with the representatives of the organization has time and again stated that it would be fair and impartial in its dealings with its members and would provide as good working conditions and as high rates of pay as was given by any other railroad, and it is known that this promise has been carried out, and that the same policy will be continued.

"In the depression period from July, 1932, to July,

1933, at Huntington, West Virginia, shops on the Chesapeake and Ohio Railway the men averaged 9.1 days per month with a greatly reduced force, while on The Virginian Railway at the Princeton Shops the men averaged 12 days per month with practically a full force, or in other words the Virginian men worked 31.8% more than the men on the Chesapeake and Ohio.

"If the employees of the Company desire to affiliate with the National organization they are free to do so. Such a course will, it is believed, and the past has so shown, result in differences and controversies between the Company and non-employee representatives, which would be avoided if there is a mutuality of interest and a relationship that has in it something of a personal nature. The Mechanical Department Association is founded on the basis of harmony, and it is the desire of the Management that this harmonious relationship shall continue.

"The above statement is made so that each member of the Mechanical Association and those employees who are not members may give careful consideration to all matters entering into the question of representation by employees of the Company on the one hand or on the other hand by representation by members of the American Federation of Labor.

"The Management therefore hopes that each man for himself will, before acting, give careful thought to the subject of representation."

VI.

Thereafter, a dispute having arisen as to whether the Mechanical Department employees of The Virginian Railway Company desired to be represented by the Association or by the Federation, the Federation invoked the services of the National Mediation Board to settle the dispute under the provisions of the Railway Labor Act (12) as amended June 21, 1934.

The National Mediation Board duly assumed jurisdiction of said dispute in accordance with the provisions

of said Act, entered said dispute upon its docket as Case No. R-5, and assigned one of its Mediators, Mr. R. B. Bronson, to investigate the dispute.

It was thereupon determined, pursuant to the provisions of said Act, to take a secret ballot of all machinists, boilermakers, blacksmiths, sheet metal workers, electricians, carmen and coach cleaners, and their specialists, apprentices, and helpers in the employ of The Virginian Railway Company in the states of Virginia and West Virginia, to determine their choice of representation in accordance with the provisions of the Railway Labor Act as amended June 21, 1934.

An Election Committee was organized, consisting of C. L. Bentley, representing the Federation, J. W. Munsey, representing the Association, and the said R. B. Bronson, Mediator.

On the 18th day of August, 1934, Mr. R. B. Bronson, together with the representatives of the Association and the Federation, sole parties to the dispute, entered into an agreement in writing, providing for the holding of such secret ballot to determine which of the contending parties was the duly and legally authorized representative of said employees in making and maintaining agreements concerning rules, rates of pay and working conditions, and for other purposes as provided in the Railway Labor Act, copy of which said agreement is hereto attached, marked "Exhibit A", and made a part hereof.

A form of notice of election, and the form of ballot to be used, were prepared by the Election Committee and posted on the bulletin boards of the shops of the defendant The Virginian Railway Company, a copy of which said form of notice is hereto attached, marked "Exhibit B" and made a part hereof.

The said secret ballot was duly taken, counted, and (13) reported in accordance with the provisions of the agreement aforesaid, and thereupon the National Mediation Board did, under date of September 13, 1934, issue its certification in words and figures as follows, to-wit:

"NATIONAL MEDIATION BOARD.

In the matter of

Representation of Employees of the Virginian Railway Company Mechanical Department

Case No. R-5

CERTIFICATION

September 13, 1934.

"On August 10, 1934, the services of the National Mediation Board were invoked by the Railway Employees Department of the American Federation of Labor in behalf of certain mechanical department employees of the Virginian Railway Company to settle a dispute among the employees as to who may properly represent the various classes of workers employed in the mechanical department, as provided by Section 2, Ninth, of the Railway Labor Act, as amended.

"The Board directed its mediator, R. B. Bronson, to investigate the dispute. During the course of the investigation an agreement was made in writing by the various organizations claiming to represent the employees that they desired to determine the question of representation by a secret ballot, that the vote should be taken and counted separately for each of the shop crafts, and that each organization receiving a majority of the legal votes cast will be recognized as representative of the employees in question.

"Following is the result of the vote as reported by the mediator and attested to by representatives of the parties who acted as observers:

MACHINISTS

Number voting for representation by System Federation No. 40, Railway Employes Dept., A. F. of L.	141
Number voting for representation by Mechanical Dept. Association of the Virginian Railway Co.	41

BOILERMAKERS

Number voting for representation by System Federation No. 40, Railway Employes Dept., A. F. of L.	51
Number voting for representation by Mechanical Dept. Association of the Virginian Railway Co.	9

BLACKSMITHS

Number voting for representation by System Federation No. 40, Railway Employes Dept., A. F. of L.	22
Number voting for representation by Mechanical Dept. Association of the Virginian Railway Co.	8

(14) SHEET METAL WORKERS

Number voting for representation by System Federation No. 40, Railway Employes Dept., A. F. of L.	37
Number voting for representation by Mechanical Dept. Association of the Virginian Railway Co.	9

CARMEN AND COACH CLEANERS

Number voting for representation by System Federation No. 40, Railway Employes Dept., A. F. of L.	98
Number voting for representation by Mechanical Dept. Association of the Virginian Railway Co.	20

ELECTRICAL WORKERS

Number voting for representation by System Federation No. 40, Railway Employes Dept., A. F. of L.	80
Number voting for representation by Mechanical Dept. Association of the Virginian Railway Co.	11

"On the basis of this investigation and report, the National Mediation Board hereby certifies that the System Federation No. 40, Railway Employes Department, American Federation of Labor, has been duly designated and authorized to represent the mechanical department employees of the Virginian Railway Company.

By order of the NATIONAL MEDIATION BOARD
GEORGE A. COOK, Secretary."

VII.

After the certification aforesaid had been duly made by the National Mediation Board, the Federation, through its duly qualified officers, made an earnest effort to arrange for a conference between the said officers and the defendant, The Virginian Railway Company through its managing officials, in order to arrive at some agreement concerning rules, rates of pay, and working conditions for the Mechanical Department employees of said The Virginian Railway Company, but the defendant Railway Company for a long time persistently avoided such a conference, and has refused and still refuses to recognize the complainant Federation as the representative of said Mechanical Department employees, and has refused and still refuses to enter into any agreement (15) with it as such representative as to rules, rates of pay, or working conditions of such employees.

The specific actions of which complaint is made are as set forth below.

On September 21, 1934, the duly elected officers of System Federation No. 40 addressed a letter to Mr. C. Bucholtz, President of said Railway Company, asking for a conference as representatives of the Mechanical Department employees of the Virginian Railway Company.

On September 29, 1934, Mr. C. Bucholtz, President of said Railway Company, addressed a letter to Mr. E. R. Belcher, Secretary-Treasurer of the Federation, acknowledging receipt of the letter aforesaid of September 21, 1934, and saying that some question had arisen as to the legality of the secret ballot taken, and that this

question had been taken up with the National Mediation Board.

On October 12, 1934, President Bucholtz wrote W. H. Gorman, special representative of System Federation No. 40, inclosing a copy of his letter addressed to E. R. Belcher, under date of September 29, 1934.

On October 14, 1934, Mr. B. M. Jewell, President of the Railway Employes Department of the American Federation of Labor, notified the National Mediation Board of the situation existing on the Virginian Railway, and requested such Board to take such steps as might be necessary and appropriate to secure a conference between the management of the defendant Railway Company and the Federation as the representative of the Mechanical Department employees of said Railway Company.

On October 19, 1934, President Bucholtz wrote to the said Mr. B. M. Jewell, expressing some criticism of the procedure under which the secret ballot had been conducted, and mentioned that this matter had been called to the attention of the National Mediation Board. Among other things contained in this letter President Bucholtz (16) said: "Pending a satisfactory answer from the Board, we are not in position to enter into a conference . . ." but said further that he would receive representatives of the Federation on November 14, 1934, unless advised to the contrary.

On October 15, 1934, George A. Cook, Secretary of the National Mediation Board, did, by order of the Board, send a letter to President Bucholtz, calling his attention to the fact that the Board had investigated the dispute among the Mechanical Department employees of The Virginian Railway Company, and had issued its certification certifying that the Federation was the duly accredited representative of such employees.

On November 10, 1934, President Bucholtz wrote to E. R. Belcher, cancelling arrangements for the conference which had been planned for November 14, 1934.

On November 12, 1934, the General Chairman of the

Federation telegraphed to President Bucholtz that he and other representatives of the Federation would be in Mr. Bucholtz's office on November 14, 1934, for the purpose of conference.

On November 14, 1934, the officers of System Federation No. 40 called at President Bucholtz's office, and were informed by Mr. Baker assistant to the President, that President Bucholtz was away on an inspection tour.

On November 19, 1934, President Bucholtz wrote to E. L. Preston, President of the Federation, mentioning the visit of the representatives of the Federation to his office on November 14th, this letter contains the following statement:

"I have also been notified by representatives of the Mechanical Department Association of the Virginian Railway that a majority of our employees are not in favor of representation by the A. F. of L. and have demanded the right to participate in any conference which may be held relating to a labor agreement, claiming that there were irregularities in the election of August 20. Fair treatment requires that the representatives of the Mechanical Department Association of the Virginian Railway have an opportunity to have their rights in the matter properly considered and determined.

"It is impractical for me to set a definite date for (17) meeting until this and other matters in connection with the situation have been clarified."

President Bucholtz further says that it was then impossible to fix a date for conference until the National Mediation Board had acted upon his objections to the secret ballot.

On November 19, 1934, W. H. Gorman, a representative of System Federation No. 40, addressed a letter to President Bucholtz in which he reviewed the situation to date, and requested a conference.

On November 19, 1934, W. H. Gorman, a representative of System Federation No. 40, called at the office of President Bucholtz.

On December 17, 1934, President Bucholtz wrote to E. R. Belcher, arranging a conference for December 27, 1934, at the office of Mr. Sasser, in Princeton, West Virginia.

On December 27, 1934, the representatives of System Federation No. 40 called at the office of Mr. Sasser, Superintendent of Motive Power, in Princeton, West Virginia, and there met Mr. Fred Oliver, the General Counsel of the Railway Company, Mr. Markham, assistant to the President, and Mr. J. W. Sasser, Superintendent of Motive Power. President Bucholtz was ill, and unable to attend. Said officers of the defendant Railway Company refused to recognize the officers of System Federation No. 40 as the duly designated and authorized representatives of the Mechanical Department employees of The Virginian Railway Company.

The complainants say that all of the above was done by the defendant with the intention of indicating to the Mechanical Department employees of the defendant The Virginian Railway Company the preference of the defendant for the Association as a representative of said employees, and with the intention of interfering with the free choice of representatives by the said employees, and with the further intention of interfering with, influencing and coercing them to join and/or to remain members of the said Association and to designate it as their representative, and that all of the unlawful acts (18) aforesaid of the individual officers and agents of the defendant were participated in, authorized and/or ratified by the defendant. Complainants further say that said acts of the defendant did result in interference with and influencing the free choice of representatives by the said employees and in interfering with, influencing and coercing them in their choice of representatives contrary to the provisions of the Railway Labor Act.

VIII.

Complainants further aver that immediately prior to, at the time of, and following the secret ballot of the Mechanical Department employees of the Virginian Railway Company, taken by the National Mediation Board,

the defendant with the unlawful purpose of influencing, interfering with and coercing the said employees in the choice of their representatives, committed numerous other unlawful acts, more particularly set forth as follows:

B. E. Nevins, Master Mechanic of The Virginian Railway Company, at Victoria, Virginia, both before and after the taking of the said ballot, stated to various Mechanical Department Employees of the said Railway, working in the shops at Victoria, Virginia, that if the Mechanical Department employees were to be represented by the Federation, the shops of The Virginian Railway Company would probably be moved away from Victoria.

The said B. E. Nevins further persuaded certain Mechanical Department employees working at the said shops not to vote in the said election, and subsequently circulated and/or caused to be circulated among employees affidavits stating that they had not voted, and asked them to sign the same. The said B. E. Nevins stated to several employees that the purpose of these affidavits was to inform the Management of The Virginian Railway Company as to who among the employees had voted for representation by the Federation. He further (19) stated to one employee who refused to sign such an affidavit that his refusal indicated that he had voted in favor of representation by the Federation. By these acts the said defendant sought to nullify the secret ballot taken by the National Mediation Board by convincing employees that it was possible for the management to ascertain how they had voted therein.

To another employee the said B. E. Nevins stated that the Virginian Railway Company had had opportunities to discharge employees, and had refrained from doing so because of the pleasant relationship existing between the Railway and the Association; but that this situation would be changed if the employees were to be represented by the Federation.

R. E. Britt, Car Foreman of The Virginian Railway Company, at Victoria, Virginia, was instrumental in as-

sisting the said B. E. Nevins in summoning Mechanical Department employees into the office of the said Nevins for the purpose of committing the unlawful acts aforesaid.

One Pond (first name unknown to the complainants), Roundhouse Foreman of the Virginian Railway Company at Victoria, Virginia, called certain employees to the office of the Master Mechanic for the purpose of urging them to sign affidavits of the nature aforesaid.

The complainants further say that the defendant through one C. R. Billmyer, so-called "lead man" at Victoria, Virginia, actually a supervisor of The Virginian Railway Company, and one Hayse (first name unknown to the complainants), Roundhouse Foreman of The Virginian Railway Company at Norfolk, Virginia, and others whose names are unknown to the complainants but well known to the defendant, circulated petitions among Mechanical Department employees of The Virginian Railway Company, at Norfolk, Virginia, at Victoria, Virginia, and at other points, which said petitions purported to express the desire of the signers thereto to be rep-
(20) resented by the Association, and the said individuals urged employees to sign the same.

Thereafter the defendant, The Virginian Railway Company, acting through certain other officers, agents, and employees, whose names are unknown to the complainants but well known to the defendant, circulated and/or caused to be circulated among the Mechanical Department employees of The Virginian Railway Company applications for membership in an organization to be known as "Independent Shop Crafts Association of Virginian Railway Company," with the unlawful purpose of interfering with, influencing and coercing said Mechanical Department employees to the end that they would sign such applications, and that thereafter the defendant The Virginian Railway Company would recognize said Independent Shop Crafts Association of Virginian Railway Company as the duly designated representative of the employees in said Mechanical Department, a copy of which said application is as follows:

"INDEPENDENT SHOP CRAFTS ASSOCIATION OF VIRGINIAN RAILWAY COMPANY.

Application for Membership.

----------193--

"I hereby make application for membership in the Association of----------, Helpers and Apprentices. I understand this Association is free from outside dictation, the purpose of which is to provide an adequate and prompt means of presentation, consideration and adjustment of any grievance that may now exist or may hereafter develop affecting in any way the working conditions rates of pay or other related matters of mutual interest to the Management and the Association.

"I hereby agree to pay the monthly dues as provided for in the by-laws of the Association.

(Signed) ----------

(Occupation) ----------

(Location) ----------

(Date Employed) ----------"

The complainants further aver that the defendant, (21) through its master mechanics, foremen, agents, special agents, and other officers and employees of the defendant, The Virginian Railway Company, at all points on the Railway where Mechanical Department employees are employed, did circulate affidavits, applications, and petitions similar to the above, and did, by statements and acts, indicate the preference of The Virginian Railway Company for a company union as the representative of said employees, seeking thereby to discredit the complainant Federation, and to nullify the results of the secret ballot taken by the National Mediation Board; and that the said persons have ever since, now are, and unless restrained by this Court will continue to employ the same or similar methods for these purposes.

The aforesaid acts of the defendant through its master mechanics, foremen, agents, special agents, and other officers and employees of The Virginian Railway Company, were designed to be and were recounted to all or substantially all of the Mechanical Department Employees in such manner as to become generally known among such employees, and to become a subject of general discussion among them. The said acts were designed to and did inspire fear among the said employees that their choice of the Federation as their representative would result in the elimination of their jobs and in discharge or demotion. The said acts were further designed to and did implant in the minds of the said employees the fear that the management of the defendant The Virginian Railway Company could and would ascertain which among them favored representation by the Federation, and that such employees would be discriminated against in favor of employees represented by the Association.

The complainants say that all of the above was done by the defendant with the intention of indicating to the Mechanical Department employees of the defendant, The Virginian Railway Company the preference of the de-
(22) fendant for the Association as a representative of said employees, and with the intention of interfering with the free choice of representatives by the said employees, and with the further intention of interfering with, influencing and coercing them to join and/or to remain members of the said Association, and to designate it as their representative. Complainants further say that said acts of the defendant did result in interference with the free choice of representatives by the said employees and in influencing and coercing them in their choice of representatives contrary to the provisions of the Railway Labor Act.

IX.

The matters referred to in the paragraphs of this bill of complaint, being paragraphs numbered V, VII, and VIII, constitute violations by The Virginian Railway Company, among other things, of the rights given to complainants and the said mechanical employees on

whose behalf this suit has been brought and is being prosecuted, by the provisions of the Railway Labor Act as amended June 21, 1934, particularly Section 2 thereof, which provides in part as follows:

"Third. Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

"Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join organize, or assist in organizing the labor organization (23) of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, * * * or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization * * *

"Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: Provided, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed

upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice * * *

"Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purpose of this Act."

and the defendant should be enjoined from influencing, coercing and intimidating said employees.

X.

If the defendant is successful in persuading, coercing, and influencing sufficient of said employees to renounce representation by the complainant Federation so that said complainant Federation will not appear to represent a majority of said employees, it will not be able to be in a position to proceed with the negotiation of an agreement for the machinists, boilermakers, blacksmiths, electrical workers, sheet metal workers, carmen and coach cleaners and their respective specialists, apprentices and helpers on behalf of whom this suit is brought and is being prosecuted, and they will be deprived of important property rights by way of being denied the right to (24) contract for their labor and services with defendant, The Virginian Railway Company, by means of collective bargaining through representatives of their own choice, which is a most valuable property right since by reason thereof they will be able to obtain higher wages, shorter working hours, better working conditions, etc., and many of the said employees who are members of the

Federation and of the local trade unions of which it is composed, and on whose behalf this suit has been brought and is being prosecuted, will be deprived of further important property rights in that if the defendant succeeds in its purpose to supplant the complainant Federation with a so-called "company union," the said employees on whose behalf this suit is brought and prosecuted will be forced to withdraw from membership in their respective labor organizations and the complainant Federation will of necessity be dissolved, there being no further purpose for its existence, and complainant Federation and its members will lose their interest in certain valuable real estate and other property owned by their respective labor organizations and will lose the insurance protection afforded them by the death benefit funds of said labor organizations.

XI.

As set forth fully above, the defendant herein has been and is influencing, coercing, and intimidating many of the complainant employees and endeavoring to cause them to breach agreements which they have heretofore entered into with the complainant Federation since the date of its organization, whereby the said complainant employees have authorized the complainant Federation to represent them in negotiations with the defendant The Virginian Railway Company, in an endeavor to make and maintain agreements concerning rules, rates of pay and working conditions, in proceedings before the National Mediation Board, and in other matters, by desig-
(25) nating the Association or some other company union to represent them in such matters in the place and stead of the complainant Federation, and said defendant has and is further interfering with, influencing and coercing complainant employees who are members of the crafts and local labor unions of which the complainant Federation is composed in an endeavor to cause them to breach and violate their contracts of membership with the complainant Federation, and the rules, by-laws, and constitution of the complainant Federation by designating the Association or some other "company union" to represent them in the aforesaid matters, and in all other matters concerning present and future relations and deal-

ings between the defendant Railway Company and the complainant employees in the place and stead of the complainant Federation, and the said defendants should be enjoined and restrained from further so influencing, interfering with and coercing complainant employees in an endeavor to cause them to breach their agreements and contracts as aforesaid.

XII.

If the injunctions and restraining orders hereinafter prayed for are not granted, the complainants and those on whose behalf this suit has been brought and is being prosecuted will suffer great substantial and irreparable loss and damage by reason of the matters hereinabove set forth, and they are without due and adequate remedy at law, and are without any remedy whatever other than by injunction and restraining orders.

As set forth above, the defendant, The Virginian Railway Company has disregarded the result of the said secret ballot and the certification of the National Mediation Board to the effect that the complainant Federation is the duly and legally selected representative of the employees of the said company in its Mechanical Department, and has taken the position, both with the said (26) Board and with the complainant Federation that the said Federation does not represent the Mechanical Department employees of said Railway Company. Complainants are informed, believe, and so aver that the defendant The Virginian Railway Company intends to and will maintain this position, and will refuse to treat with the complainant Federation or confer with it as to making and maintaining of agreements concerning rules, rates of pay and working conditions of employees of the defendant Railway Company in its Mechanical Department, and will maintain this position in all negotiations with the National Mediation Board, all on the alleged ground that the complainant Federation does not represent the said employees.

Complainants further allege that the defendant is now making every effort to interfere with, coerce, and influence sufficient additional complainant employees, in or-

der to induce them to cancel agreements to be represented by complainant Federation, and in its place and stead to designate the aforesaid Association or some other "company union" to represent them in all negotiations and proceedings.

Accordingly an immediate restraining order is necessary to prevent complainants and those in behalf of whom this suit has been brought and is being prosecuted, from sustaining great and irreparable loss and damage by reason of the fact that the defendant may at any moment be successful in pursuading, influencing and coercing sufficient Mechanical Department employees to cancel said agreements of representation by the complainant Federation so that said complainant federation will no longer appear to represent such Mechanical Department employees, and will not be able to be in a position to proceed with the present or other negotiations, or proceedings before the National Mediation Board, or otherwise, in the interest of said employees, and said employees on (27) behalf of whom this suit has been brought and is being prosecuted would be deprived of important property rights by way of loss of increased wages by way of being denied the right to contract for their labor and services with the defendant, The Virginian Railway Company by means of collective bargaining through representatives of their own choice, which is a most valuable property right since by reason thereof they will be able to obtain higher wages, shorter working hours, better working conditions, etc., and many of the said Mechanical Department employees who are members of the crafts or labor unions of which the complainant Federation is composed, and on whose behalf this suit has been brought and is being prosecuted, will be deprived of further important property rights in that if the defendant succeeds in its purpose to supplant the complainant Federation with the Association or some other "company union" the said Mechanical Department employees on whose behalf this suit is brought and prosecuted will be forced to withdraw from membership in complainant Federation and the crafts and local unions of which it is composed, and the complainant Federation will of necessity be dissolved, there being no further purpose for its existence, and complainant Federation and its members

and the members of the crafts and local labor unions of which it is composed will lose their interest in certain valuable real estate and other property owned by said unions of which the crafts and labor unions composing the complainant Federation form a part, and will lose the insurance protection afforded them by death benefit funds of such unions.

That a majority of all of the five hundred fifty (550) Mechanical Department employees of defendant Railway Company herein referred to really and sincerely desire the complainant Federation and its officers to act for and represent them in the pending matter and other matters concerning wages, hours of labor and working con-
(28) ditions, and but for the interference, influence and coercion of the defendant, each and all of said employees would so openly express themselves.

XIII.

Complainants further allege that they have no adequate remedy at law as against the said unlawful acts of the defendant which have been and are being committed, or against the said unlawful acts of the defendant which they believe and aver it proposes to commit in the future.

That as to each item of relief hereinafter prayed for the defendant will suffer no injury whatever from the granting of the same, but the complainants will suffer great and irreparable injury, the exact nature of which has been set out above, if the said relief shall be refused.

That the National Mediation Board and the members thereof have proceeded in this matter to protect the property rights of the complainants as set forth more particularly above in so far as the said Board and the members thereof are enabled to do under the provisions of the Railway Labor Act, and that the said Board and its members are unable to afford the said property rights further protection, and that there are no other public officials charged with the duty of protecting the same.

WHEREFORE, complainants pray that:

First. That a notice, summons, subpoena, or other proper process issue from this Court ordering the defendant to appear herein and answer the allegations of this bill.

Second. That a rule issue out of this Court requiring the defendant to appear herein on a day certain and show cause why a mandatory injunction should not issue from this Court requiring it to recognize and treat with the complainant System Federation No. 40, Railway Employees Department of American Federation of Labor as the duly and legally accredited representative of the (29) Mechanical Department employees of The Virginian Railway Company.

Third. That a rule issue out of this Court requiring the defendant to appear herein on a day certain and show cause why a restraining order should not issue from this court restraining and enjoining the defendant from in any way or manner interfering with, influencing, intimidating, or coercing complainant employees or any of the said five hundred fifty (550) Mechanical Department employees of The Virginian Railway Company referred to herein with respect to their free and untrammeled right of selecting or designating their representatives for the purpose of making and maintaining contracts with the defendant relating to rules, rates of pay, and working conditions and/or for the purpose of considering and deciding disputes between the said employees and the defendant Railway Company, as well as for any and all other purposes of the Railway Labor Act; further restraining and enjoining the defendant from further organizing, promoting, fostering, or encouraging The Mechanical Department Association of The Virginian Railway Company, Independent Shop Crafts Association of the Virginian Railway Company, or any other association or "company union", so-called, of said five hundred fifty (550) Mechanical Department employees herein referred to, as well as from in any manner preventing or discouraging said employees from becoming or remaining members of the complainant Federation or of the crafts or local unions of which it is composed; and further restraining and enjoining the defendant from entering into any contract concerning rules, rates of pay,

or working conditions affecting the Mechanical Department employees of The Virginian Railway Company, with the Mechanical Department Association of The Virginian Railway Company or Independent Shop Crafts Association of The Virginian Railway Company, or any (30) other association or "company union" so called, as the representative of the said Mechanical Department employees, save only the complainant Federation.

Fourth. That upon final trial and hearing of this cause the said restraining order and injunction be in all things made permanent and perpetual.

Fifth. For such other and further relief as the complainants may be entitled to in the premises.

S. M. BRANDT,
FRANK L. MULHOLLAND,
Attorneys for Complainants.

State of West Virginia,
County of Mercer, ss.

E. J. Preston, being first duly sworn according to law, deposes and says that he is one of the individual complainants in the above entitled action; that he is System General Chairman of the complainant System Federation No. 40, Railway Employes Department of the American Federation of Labor; that he is fully authorized to make this verification on behalf of said Federation, and does make the same on behalf of said Federation as well as on his own behalf; that he has read the above bill of complaint and knows the contents thereof; that he has personal knowledge of all the facts and things set forth therein and that the allegations therein contained are true.

E. J. PRESTON.

Sworn to before me by the said E. J. Preston this 11th day of April, 1935.

EUNICE F. HATCHER,
(Seal) Notary Public, County of Mercer, West Virginia.

My commission expires February 26th, 1942.

(31) **EXHIBIT A:**

AGREEMENT

WHEREAS, a dispute exists as to whether the Shop Crafts Employees in the service of The Virginian Railroad desire to be represented by the Mechanical Department Association of the Virginian Railroad Company or by the Railway Employes Department of the American Federation of Labor; and,

WHEREAS, it is the desire to determine the question of representation by a secret ballot of eligible employees; it is therefore

AGREED by the parties hereto as follows:

1. The term "carrier" as used herein shall mean the Virginian Railroad. The term "Association" as used herein shall mean the Mechanical Department Association of the Virginian Railroad Company. The term "Railway Employes' Department" shall mean the Six Shop Craft Organizations belonging to the Railway Employes' Department of the American Federation of Labor.

2. Employees eligible to vote shall be those below the rank of foremen in the crafts generally known as Machinists, Boilermakers, Blacksmiths, Sheet Metal Workers, Electrical Workers, and Carmen, their apprentices and helpers whose names appear on the pay-roll for the first half of April, 1934, and those who have been furloughed since April 1, 1934. Leading men whose duties are wholly supervisory will not be included. Linemen in the telegraph and telephone department will be considered eligible to vote, also coach cleaners.

3. Prior to the taking of the Ballot a list of the eligible voters will be prepared, showing the name, pay-roll classification and location of each employee entitled to vote.

Only those employees shown on this list will be per-

mitted to vote, except that in event an employee's name is left off the list in error, or improper classification, upon proof of such error, or improper classification, the employee's name will be added to the list and he will (32) be allowed to vote. Absentee employees whose names are shown on the official list shall be furnished ballots by mail. Employees who voluntarily leave the service, or are dismissed for cause, subsequent to the date the official list is agreed upon, will not be allowed to vote.

4. The vote will be taken and counted separately for each of the Six Shop Craft Organizations, and each Organization receiving the majority of the legal votes cast will be recognized as representative of the employees in question.

5. The taking and counting of the secret ballot will be conducted by a representative of the National Mediation Board, who may be accompanied by a representative designated by the duly elected officers of the Mechanical Department Association, and by one designated by the Railway Employes' Department, who may act as silent observers of all ballots cast, assist the representative of the National Mediation Board when requested, and jointly with him assist in the counting, tabulating the ballots and attesting to the results of the same.

6. The representative of the National Mediation Board will interpret and apply the rules governing the election and decide matters relative to classification, etc.; he will also, with the designated representatives, mail ballots to eligible voters not afforded an opportunity to vote in person, and personally hand a ballot to each eligible voter in the voting place and see that each voter personally deposits his ballot in the ballot box.

7. The ballots will be printed on paper of different colors for each of the Six Crafts and their respective helpers and apprentices, as follows:

Machinists—Light green.
Blacksmiths—Light blue.
Boilermakers—Pink.

Sheet Metal Workers—Light brown.
Electrical Workers—Light yellow.
Carmen and Coach Cleaners—White

8. The dates upon which the election will be held at the various points, etc., will be determined by the representative of the Board from time to time during the (33) period of the taking of the vote, and as much notice as possible will be given the representatives who are to accompany him in order that they may have notices posted in the various shops to be visited. These notices will be prepared by the representatives of the two organizations and approved by the representative of the Board. No notices concerning the election will be posted during the period of the election, except those approved by the representative of the Board.

9. The representative of the National Mediation Board, with designated representatives, will prepare the form of Ballots and the instructions in connection therewith, and will set the closing date of the Ballot and the date the Ballot will be counted.

Signed this 18th day of August, 1934.

RAILWAY EMPLOYEES'
DEPARTMENT, A. F. OF L.,
Signed: C. L. BENTLEY.

MECHANICAL DEPARTMENT
ASSOCIATION OF VIRGINIAN
RAILWAY COMPANY
Signed: J. W. MUNSEY.

Witness:

Signed: R. B. BRONSON, Mediator
National Mediation Board.

(34) **EXHIBIT B.**

NOTICE OF ELECTION

To be Held under the

RAILWAY LABOR ACT

Involving

SHOP CRAFT EMPLOYEES

and

THE VIRGINIAN RAILWAY COMPANY

TO ALL CONCERNED:

A secret ballot will be taken of the eligible voters on the question of representation as submitted to the National Mediation Board, by the Railway Employes' Department of the American Federation of Labor at:

Place	Date	Between hours of

The vote will be taken and counted separately for each of the six shop crafts organizations and each organization receiving a majority of the legal votes cast will be recognized as representative of the employees in question.

Attention is called to Section 2, Railway Labor Act, providing that elections shall be free from interference, influence or coercion also that it is unlawful for any carrier to interfere in any way with the organization of its employees.

Report any violation to the Mediator, or the National Mediation Board, Washington, D. C.

The employees eligible to vote shall be those below the rank of foreman in the Crafts generally known as Machinists, Blacksmiths, Sheet Metal Workers, Electrical Workers, Boilermakers, Carmen and Coach Cleaners and their apprentices and helpers who were on the payroll of the Virginian Railway Company covering the first

half of April, 1934, or, who have been furloughed since April 1, 1934.

A list of eligible voters has been prepared by the Mediator and the names of the eligible voters are posted at each voting point on the Carrier's Bulletin boards, by mutual agreement all other points will be voted by mail.

Only those employees shown on such list will be per-
(35) mitted to vote except that in the event the name of an employee is left off the official list in error, upon proof of such error the employee's name will be added to the list and such employee allowed to vote.

The election will be supervised by Mr. R. B. Bronson, Mediator, National Mediation Board, and he shall interpret and apply the rules governing the election, and decide all challenged votes.

The Railway Employees' Department, American Federation of Labor will be represented by C. L. Bentley, The Mechanical Department Association will be represented by J. W. Munsey, who shall act as observers and assist the Mediator in the collecting and counting of the ballots, identifying individual voters upon request, and assist in any way as may be necessary for the successful completion of the vote.

COPY OF THE OFFICIAL BALLOT IS MADE A PART OF THIS NOTICE.

Official Ballot

To Determine Representation

of

Shop Craft Employees, The Virginian Railway Company

Do Not Sign Your Name

A. Instructions for voting: The following instructions must be followed in casting your ballot.

B. This ballot is handed to you in person by the Government Mediator; mark an X in the square of your

choice, fold the ballot in any manner that will hide the mark you have made, and deposit the ballot personally in the ballot box.

C. If this ballot is received by you through the mail, proceed as follows: Mark an X in the square of your choice, then place the ballot in the secret envelope marked "A", and seal the envelope without placing any mark of identification thereon. After sealing envelope "A", place it in the mailing envelope addressed to the Government Mediator marked "B" and seal, then write your name and address in the upper left hand corner of envelope "B", (which will be destroyed after it is checked against the list of employees voting by mail and before envelope "A" is opened).

(36) Mark "X" in one square only to designate your choice.

If you desire to be represented by System Federation No. 40, Railway Employes' Department, American Federation of Labor:

MARK AN "X" IN THIS SQUARE

If you desire to be represented by the Mechanical Department Association of The Virginian Railway Company:

MARK AN "X" IN THIS SQUARE

(The writing of more than one X will make ballot illegal.)

C. L. BENTLEY, Representing
Division No. 2, Railway
Employes' Department, A. F. of L.

J. W. MUNSEY, General Chairman
Mechanical Department Association.

MOTION TO DISMISS BILL OF COMPLAINT

(37) Filed May 20, 1935.

(Style of Court and Title omitted.)

Comes now the defendant and moves the court to dismiss the bill of complaint herein for the following reasons:

1. Because the bill depends for support upon the amended Railway Labor Act, and said Act is void so far as it is relevant hereto in that—

(a) It goes beyond the power granted to Congress by the Constitution of the United States in that the said Act undertakes to regulate the relations between carriers by railroad in the United States, including this defendant, and employees of such carriers including defendant's employees with whom this suit is concerned, engaged in purely intrastate business and not engaged in interstate commerce or in commerce of any character.

(b) If as applied to the facts alleged in the bill it is construed as attempting to require defendant against its will to recognize and treat with the complainant System Federation No. 40, Railway Employees Department of the American Federation of Labor, it contravenes Amendment 5 of the Constitution of the United States.

(c) It is so uncertain, indefinite, vague, and unintelligible that the intention of Congress cannot be ascer-
(38) tained, and the provisions can not be executed.

(d) For the reasons next above indicated, and for other reasons, it embodies an attempt by Congress to delegate its legislative powers in a manner which contravenes the Constitution of the United States.

2. Because the bill depends for support upon the certificate of the National Mediation Board issued in purported compliance with the amended Railway Labor Act on September 13, 1934, and referred to in Paragraph 1

and subsequent paragraphs of the bill, and said certificate is void because—

(a) If as applied to the facts alleged in the bill it is construed as attempting to require defendant against its will to recognize and treat with the complainant System Federation No. 40, Railway Employees Department of the American Federation of Labor, it contravenes Amendment 5 of the Constitution of the United States.

(b) It was not issued within 30 days after the receipt of the invocation of the National Mediation Board's services as required by the said Act.

(c) It is based wholly upon an election therein recited, and such election was conducted and decided under rules which are contrary to the amended Railway Labor Act, Section 2, Fourth, providing: "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act."

(d) It does not find as a fact and the National Mediation Board has not found or reported as a fact that as of the date of the invocation of its services or as of the date of its certificate, a dispute existed among defendant's employees as to who were the representatives of such employees for the purposes of the Act.

(e) It does not find as a fact and the National Medi-
(39) ation Board has not found or reported as a fact that a majority of any craft or class of defendant's employees have chosen the complainant, System Federation No. 40, Railway Employees Department of the American Federation of Labor, as their representative for the purposes of the Act, or that a majority of such employees have in any other way indicated that they desire the said System Federation No. 40 to represent them in the capacity stated.

3. Because it appears from the face of the bill that it is brought in behalf and in the pretended interest of many of defendant's employees who have declined to authorize complainants to represent them for the pur-

poses of the amended Railway Labor Act, and the interests of complainants are not the same as, but are adverse to, the interests of said dissenting employees.

4. The bill must be dismissed as to System Federation No. 40, Railway Employees Department of the American Federation of Labor, because there is no property right in said complainant with respect to employees' right of organization and representation, by virtue of the amended Railway Labor Act or otherwise.

W. C. PLUNKETT,
W. H. T. LOYALL,
H. T. HALL,
JOHN C. DONNALLY,
Attorneys for Defendant.

Service of the foregoing motion accepted this 20th day of May, 1935.

FRANK L. MULHOLLAND,
Attorney for Plaintiffs.
Per W. H. McEWEN.

ANSWER OF THE VIRGINIAN RAILWAY CO.

(40) Filed May 20, 1935.

(Style of Court and Title omitted.)

The defendant, The Virginian Railway Company, without waiving any of the foregoing grounds for dismissing the bill of complaint as insufficient in law, but especially insisting thereon and reserving all manner of benefit and advantage of exception to the errors and insufficiencies contained in the bill of complaint, for answer thereto, or to so much thereof as it is advised that it is material for it to answer, and asking that this answer be received also as a return to the rule to show cause issued by this court on May 6, 1935, answering, says:

I.

Defendant has no information as to whether or not,

as alleged in paragraph I of the bill of complaint, System Federation No. 40, Railway Employees Department of the American Federation of Labor, hereinafter usually referred to as the Federation, and the various system craft organizations mentioned in this paragraph are voluntary associations composed of the local lodges of the respective crafts that have been organized among the employees of the mechanical department of the Virginian Railway Company. Defendant has no information as to whether or not as alleged the said Federation was organized on April 28, 1934. This defendant denies that said Federation or the said local lodges or voluntary (41) associations allegedly organized and affiliated with the American Federation of Labor represented on the 28th of April, 1934, a majority of the employees of the mechanical department of the Virginian Railway Company, or that said Federation or said local lodges or voluntary associations now represent, or at any time since April 28, 1934, have represented, or represent, through delegates or otherwise, a majority of the employees of the mechanical department of the Virginian Railway Company, or a majority of the employees in any of the crafts of which said mechanical department was and is composed. On the contrary, defendant alleges that at no time prior to, on, or since April 28, 1934, has the said Federation, or have the said so-called local lodges or voluntary associations, represented a majority of the employees of defendant's mechanical department, or represented a majority of the employees in any of the crafts of which said mechanical department was and is composed. Defendant further denies that the said Federation has been duly authorized or designated by a majority of its mechanical department employees since the 28th day of April, 1934, to represent them in matters relating to working agreements, rates of pay, and working conditions, or for any other purpose under the Railway Labor Act, or otherwise.

Defendant denies that by virtue of the alleged certificate of the National Mediation Board of September 13, 1934, in Case No. R-5, the said Federation was duly or legally authorized to represent said mechanical department employees, or any of them, and alleges that neither the said Federation nor its general chairman has been

or is now, by virtue of said certificate or otherwise, duly or legally authorized to represent said employees or any of them concerning rules, rates of pay, or working conditions, or for any other purpose under the Railway Labor Act or otherwise. Defendant alleges that more than 50 per cent of the employees in its mechanical department which the said Federation claims to represent under the certificate of the Mediation Board are not engaged in interstate commerce, but are engaged in purely intrastate (42) business, and that the Railway Labor Act, as amended, can not within the scope of the interstate commerce clause of the Constitution vest in the Mediation Board any power or authority to certify or designate the representatives of such employees for the purpose of collective bargaining with defendant. Defendant therefore denies that the Mediation Board's certificate of September 13, 1934, confers any legal right upon the said Federation to represent the mechanical department employees of defendant who are engaged solely in intrastate business, and asserts that there is no legal obligation upon defendant to recognize such certificate, or the representatives therein designated, for the purpose of collective bargaining with such intrastate employees or with any of its employees.

Moreover, defendant alleges that if the amended Railway Labor Act as applied to the facts alleged in the bill or as applied to the facts established in evidence be construed as attempting to require defendant against its will to recognize and treat with the complainant System Federation No. 40, Railway Employees Department of the American Federation of Labor, then such Act and the Mediation Board's certificate of September 13, 1934, issued in purported compliance therewith are in contravention of Amendment 5 of the Constitution of the United States and void.

Defendant denies that the complainants have, or any of them has, the right, under the Railway Labor Act or otherwise, to bring this suit on behalf of or as the representatives of all the members of said Federation, or all the members of the various local trade unions of which said Federation is composed, or all the mechanical department employees of defendant in the states of Vir-

ginia and West Virginia, or of any of the above, or of all or any of the other persons described in this connection in this paragraph of the bill. Defendant also denies that all of the persons in whose behalf it is alleged that this suit is brought form a general class of persons with a common and general interest in the subject matter of this suit, or that the complainants represent or any of (43) them represents the rights or interests of those in whose behalf the suit is said to be prosecuted.

Defendant has no information as to whether or not as alleged the individual complainants who are alleged to occupy the respective positions in the different crafts of which System Federation No. 40 is alleged to be composed occupy said several positions or have the respective powers and authority as alleged in the bill of complaint, or constitute the system committee of the mechanical employees of defendant who are members of the (44) local lodges affiliated with said Federation.

Defendant denies that said complainants, or any of them, as officers and members of the various crafts of which said Federation is composed, or otherwise, have authority to bring this suit either in their own behalf or in behalf of all of defendant's mechanical department employees in the States of Virginia and West Virginia, or of any of the above, or of all or any of the other persons described in this connection in this paragraph of the bill.

II.

Defendant admits that it is a corporation in all respects as alleged in paragraph II of the bill, and that it is a common carrier by railroad, and is the owner and operator of the Virginian Railway, but defendant has no information as to whether or not it is the employer of all the persons in whose behalf this suit is brought.

III.

Defendant admits that this is a suit of a civil nature, but denies that it arises under the constitution or laws of the United States or that it is instituted pursuant to,

or under the authority of, the Railway Labor Act of May 20, 1926, as amended by Act of June 21, 1934, or any other law of the United States relating to interstate commerce, and defendant denies that this court has jurisdiction of this suit under the constitution or laws of the United States relating to interstate commerce and that this court has any general equity jurisdiction in relation thereto.

IV.

Defendant denies that on or about the 1st day of October, 1922, or at any other time, it or its officers, agents, or employees, formed or inspired or instigated the formation of the Mechanical Department Association of the Virginian Railway Company, or of any other organization of employees in its mechanical department, or that it or its officers, agents, or employees have undertaken or attempted, either directly or indirectly, to influence or coerce its mechanical department employees in the organization, or in the designation by said em-
(45) ployees, of said association or of any other association as their representative. Defendant alleges that neither it nor its officers, agents, or employees had any part in the organization of said Association, or any similar association for the purposes of labor relations, and denies that said association is a "company union" or is, in any sense, the representative or instrumentality of defendant, or is in any way under its domination.

Defendant admits that on or about October 1, 1922, the Mechanical Department Association of the Virginian Railway Company was organized, and that on the 15th day of November, 1922, defendant entered into a written agreement with said association fixing the rates of pay, rules, and working conditions of all machinists, boilermakers, blacksmiths, sheet metal workers, electricians, carmen, and their respective apprentices and helpers, employed in defendant's mechanical department. A copy of the said agreement, marked Exhibit Answer No. 1, is hereto attached and made a part hereof.

Defendant alleges that said association was organized at the instance and by the direction of the United States

Railroad Labor Board by voluntary action of a large majority of its mechanical department employees. The facts concerning the organization of the association are that on July 1, 1922, the Railway Employees Department of the American Federation of Labor called a nation-wide strike directing the mechanical department employees of all of the railroads in the United States to cease and desist from doing any work for their employers on and after July 1, 1922. Pursuant to said strike order a large number of defendant's mechanical department employees quit the employ of defendant. Thereafter, by acts of intimidation, coercion, and threats, and by acts of physical violence, the said Railway Employees Department of the American Federation of Labor, its officers, agents, and members, interfered with and sought to coerce, the employees of defendant remaining at their duties, and sought to prevent others from taking the places of the strikers, which acts on the part of the (46) Railway Employees Department of the American Federation of Labor, its officers and agents, so interfered with the operation and movement of trains by defendant in interstate commerce that defendant applied for and was granted permanent injunctions by the District Courts of the United States for the Western District of Virginia and for the Southern District of West Virginia, respectively, prohibiting the said Railway Employees Department of the American Federation of Labor, its officers, agents, and members, from in any way interfering with defendant's employees in the performance of their duties, or with defendant in the movement of its trains in interstate commerce.

On July 3, 1922, the United States Railroad Labor Board issued a resolution calling upon the employees of carriers generally, including defendant, to organize associations for the purposes of collective bargaining, and all other matters dealing with rates of pay, rules and working conditions. Shortly thereafter, the mechanical department employees of defendant, voluntarily and without interference by defendant, organized on October 1, 1922, an association under the name of Mechanical Department Association of the Virginian Railway Company. Said association, at the time of its organization, represented, and at all times since has represented, and

numbered among its membership, practically all of defendant's mechanical department employees. The said association was authorized by its members to represent them in all matters relating to their employment, and pursuant to such authority entered into the agreement above referred to with defendant, which became effective November 15, 1922, which agreement now is and was in effect upon the date of the filing of the bill of complaint in this suit.

Defendant alleges that there does not now exist any dispute between it and its employees, either collectively or as individuals, growing out of said agreement or any provision thereof. Defendant denies the allegations of the bill that said association has never been and that since the 28th day of April, 1934, it has not been, the (47) duly and legally constituted representative of the mechanical department employees of defendant for the purposes mentioned in this paragraph of the bill. Defendant admits that ever since November 15, 1922, it has recognized and dealt with said association as the duly constituted representative of its mechanical department employees in respect of the matters covered by said agreement.

V.

In answer to paragraph V of the bill, defendant says that it has no information as to whether or not System Federation No 40, Railway Employees Department of the American Federation of Labor, was organized on the 28th day of April, 1934, by certain of defendant's employees or whether or not the persons named in said paragraph were elected as the officers of said Federation.

Denying general allegations in this paragraph of the bill, defendant denies that at any time it or its officers or agents unlawfully interfered with, influenced, or coerced the employees in its mechanical department, or attempted to interfere with, influence, or coerce such employees, in such manner as to cause them to withdraw their membership from the Federation and/or to withdraw from it their authorization to represent them.

Defendant further answering said paragraph of complainant's bill, admits that J. W. Sasser, its Superintendent of Motive Power, issued the statement referred to in this paragraph of the bill. The said statement, as quoted in complainant's bill, is not complete, and defendant attaches hereto a complete copy of said statement as Exhibit Answer No. 2, and asks that the same be considered a part of this answer. Defendant denies that the issuance of said statement constituted or was intended to constitute any interference, coercion, or influence in respect of the rights of its employees in the matter of self organization, or in respect of the desig; nation by its employees of representatives under the provisions of the Railway Labor Act, as amended, or that the issuance of said statement had the effect of influ-
(48) encing, coercing, or interferring with its employees in violation of the provisions of the Railway Labor Act, as amended.

VI.

Answering paragraph VI of the bill, defendant denies that there has been or is any dispute among the employees of its mechanical department as to whether such employees desire to be represented by the Association or by the Federation, or that there has been or is any dispute over which the Mediation Board could take cognizance under the Act.

For reasons hereinafter set forth in this paragraph, defendant denies that the determination to take a secret ballot of defendant's mechanical department employees, as set forth in this paragraph of the bill, was pursuant to the provisions of the Act, or that J. W. Munsey, alleged in the bill to be representing the Association as a member of the election board or committee, did in fact represent such Association.

Further answering this paragraph of the bill, and by reason of the facts hereinafter in this paragraph recited, defendant asserts that the agreement alleged in the bill to have been entered into on the 18th day of August, 1934, between an alleged representative of the Association and a representative of the Federation was not a

valid agreement, because the aforesaid Munsey alleged to be representing the Association was not in fact representing the Association but was representing the Federation, a party to the purported agreement with interests adverse to the interests of the Association, and because the rules contained in the said purported agreement regarding the determination of the choice of the employees as to their representative were contrary to the provisions of the Act.

Further answering this paragraph of the bill, defendant alleges that it has at all times maintained harmonious and friendly relations with its mechanical department employees, and that these harmonious and friendly relations continued and remained undisturbed from the date of the organization of said Mechanical Department (49) Association until some time in the year 1933, and prior to the alleged organization of System Federation No. 40, when the Railway Employees Department of the American Federation of Labor and its officers, agents, and organizers unlawfully came upon the property of defendant and sought, by intimidation, coercion, and threats, to disturb these friendly and harmonious relations, and endeavored to coerce members to withdraw from said Association, and to have the said Railway Employees Department designated as the representative of the employees of the mechanical department of defendant as to all matters pertaining to rates of pay, rules, and working conditions. Pursuant to, and in furtherance of this end, under date of March 17, 1934, and prior to the alleged organization of the said System Federation No. 40, one B. M. Jewell, President of the Railway Employees Department of the American Federation of Labor, addressed a letter to defendant stating that he had been designated and authorized, as such President, to represent the employees of the mechanical department of defendant, and demanding that defendant name a date and place for a conference at which he would prove that he was the duly authorized and designated representative of all the crafts of the mechanical department employees of defendant.

Some time prior to April 17, 1934, and prior to the alleged organization of said System Federation No. 40, the

Railway Employees Department of the American Federation of Labor requested the services of the Board of Mediation, as constituted under the Railway Labor Act of May 20, 1926, in connection with an alleged dispute in regard to the right of said organization to represent defendant's mechanical department employees. Notwithstanding the fact that the Board of Mediation was advised that no such dispute existed, and notwithstanding the fact that no such dispute did exist, the said Board accepted the invocation of its services, and sent its mediator, R. B. Bronson, to Norfolk, Virginia, on June 4, 1934, for the purpose of mediating the alleged dispute. After conferences with Mediator Bronson and the Chairman of the Board of Mediation, the board was (50) advised that its offer of mediation would be accepted, and that the American Federation of Labor would be called upon to substantiate its claim to represent defendant's mechanical department employees.

Thereafter, on July 5, 1934, Mediator H. H. Reed was sent to Norfolk to determine whether or not a majority of defendant's mechanical department employees had authorized the American Federation of Labor to represent them in matters pertaining to their employment. At a conference called by Mediator Reed, there were present J. J. Duffy representing the American Federation of Labor, but not an employee of defendant, and, at the invitation of the mediator, representatives of defendant. It was thereupon arranged that the authorizations held by the Railway Employees Department of the American Federation of Labor should be checked against defendant's payrolls for the first half of April, 1934, and that these authorizations should embrace the following classes of employees: machinists, boilermakers, blacksmiths, sheet metal workers, electrical workers, carmen, helpers and apprentices of the foregoing, firemen, oilers, coach cleaners, power house employees, and round house and shop laborers. This check was commenced on July 6, 1934, and after the check had continued until July 10, 1934, and before the check was completed, the said Duffy, representing the American Federation of Labor, notified Mediator Reed that he desired to withdraw that portion of the request for mediation covering firemen and oilers, and round house and shop laborers, despite the fact that

these last named classes of employees were included in B. M. Jewell's letter of March 17, 1934, and in the arrangement for checking the authorizations before the check was commenced. The said B. M. Jewell thereupon applied to the Mediation Board to withdraw the firemen and oilers, and round house and shop laborers, from the subject of mediation, and over defendant's objection the said Board ordered this withdrawal to be made.

Upon information and belief, defendant charges that (51) the change in the arrangements as to the employees to be included in the check was due to the knowledge which had come to the representatives of the American Federation of Labor that it would be impossible for said organization to obtain the authorizations of a majority of the employees as included in its prior request, and defendant further charges that the Mediation Board's action in changing the subject matter of the mediation as such mediation was accepted by defendant and during the progress of the same was arbitrary and unfair.

In accordance with the revised arrangement as to the crafts to be included the check of the authorizations presented by said Duffy was concluded on July 16, 1934, with the result that the Railway Employees Department of the American Federation of Labor was shown to hold authorizations from 408 employees out of a total of 1058 employees, if firemen and oilers and shop and round house laborers were included, and if said classes were excluded, the aforesaid organization held 408 authorizations out of a total of 845 employees, and the Railway Employees Department of the American Federation of Labor was unable to show that it held authorizations from as much as 50 per cent of the employees, on either basis. Neither the Mediation Board nor its mediator took any further action in the matter of the check of authorizations above referred to.

On August 10, 1934, defendant was advised that the Mediation Board had accepted a new request for mediation from the Railway Employees Department of the American Federation of Labor for investigation and certification of representatives of defendant's mechanical department employees under the provisions of the amended Railway Labor Act. The Mediation Board was

advised of the proceedings which had theretofore been had on the application of the American Federation of Labor to the Board of Mediation, and defendant protested against any further investigation of the matter on the ground that the constant agitation of the ques-
(52) tion of employee representation, and the methods pursued in that connection by organizers sent out by the American Federation of Labor, seriously interfered with the efficiency of defendant's employees. Notwithstanding defendant's protest, the Mediation Board again sent its mediator, R. B. Bronson, on August 13, 1934, for the purpose of investigating the question of representation of defendant's mechanical department employees.

At the instance of Mediator Bronson a conference was held at Norfolk, Virginia, on August 14, 1934, at which were present Mediator Bronson, C. L. Bentley, representing the Railway Employees' Department of the American Federation of Labor, but not an employee of defendant, and, at the invitation of Mediator Bronson, J. W. Sasser, Superintendent of Motive Power of the defendant, and L. A. Markham, Assistant to President of defendant. At this conference said Bentley insisted that he was authorized to represent J. W. Munsey, General Chairman of the Mechanical Department Association of the Virginian Railway Company, and that said Munsey be designated the representative of the said Association for the purposes of the conference. The Mediator announced that an election would be held to determine the question of employee representation. The said Bentley insisted that said Munsey be designated to represent the said Association as a member of the proposed election board and an observer at the proposed balloting. Although it was developed in the course of the conference that said Munsey in fact represented the American Federation of Labor and was then and had previously been identified with said organization and had been active in conducting a campaign to secure membership for the same among defendant's mechanical department employees, and although Mediator Bronson stated during the conference that by reason of such facts said Munsey should not serve as the representative in the respects above indicated of the Association, nevertheless after conferring by telephone with the National Mediation Board at Washington Mediator Bronson designated

said Munsey as the representative of the Association for said purposes.

As the result of the conference above referred to, rules (53) and regulations governing the holding of an election to be held August 16, 1934, were agreed upon and the agreement was reduced to writing and signed by Mediator Bronson for C. L. Bentley, as representing Railway Employees Department, of the American Federation of Labor, for said Munsey as General Chairman of Mechanical Department Association, and for defendant's Superintendent of Motive Power, J. W. Sasser as representing the defendant, the name of the said Sasser being signed at the special instance and request of said Bentley. A copy of said agreement is attached hereto designated "Exhibit Answer No. 3," and made a part hereof. This agreement contains the following provision:

"The vote will be taken and counted separately for each of the six shop craft organizations, and each organization receiving a majority of the total votes shown on the eligible list of voters will be recognized as representatives of the employees in question."

Pursuant to this agreement and to the law authorizing the same, an election was ordered to take place by secret ballot to be held at Princeton, West Virginia, on August 16, 1934, and at other points on defendant's line on subsequent days, to determine the duly designated representative of each craft of said employees, the election to be conducted under the rules approved by the Mediation Board and embodied in said agreement.

The mediator proceeded with the said election at Princeton on August 16, 1934, with C. L. Bentley and J. W. Munsey acting as members of the election board and as observers. The election was fairly conducted without interference by the defendant or any of its officers or agents. Nevertheless, after the conclusion of the August 16, 1934, balloting at Princeton, the said Bentley, representative as aforesaid of the American Federation of Labor, protested the said election to the mediator (54) and to the Mediation Board, and requested that a new election be held. Upon information and belief,

defendant avers that Bentley's said protest and request were prompted by his knowledge that a majority of those eligible to vote at Princeton had not voted in such balloting, and that if the rules which had theretofore been adopted for the election were continued in effect with respect to the future balloting at other points, the aforesaid System Federation No. 40 would fail of election as the representative for the purposes of the amended Railway Labor Act of any of the crafts concerned. Mediator Bronson communicated the protest and request of the said Bentley to the Mediation Board at Washington, and although the said Board made no investigation to determine whether the election was fairly conducted, and although its representative, Mediator Bronson, stated on not less than two occasions that the election was conducted fairly and without any improper actions on the part of defendant or its agents, the said Board set aside said election and ordered that a new election be held beginning at Princeton on August 20, 1934, and at other points on subsequent days, and further ordered that the new election be held under rules at variance with the rules agreed upon for the election of August 16, 1934, and at variance with the provisions of the Act hereinafter set forth, in that it was provided in the new rules as follows:

"The vote will be taken and counted separately for each of the six shop craft organizations, and each organization receiving the majority of the legal votes cast will be recognized as representative of the employees in question."

Defendant charges that the action of the Mediation Board in so changing the rules governing the election at the instance and request of said Bentley was arbitrary and unfair.

The said second election was accordingly held beginning on August 20, 1934, and based on the result thereof, the National Mediation Board issued its certificate of September 13, 1934, as set forth in the bill, paragraph (55) VI, by which certificate said Board certified System Federation No. 40, Railway Employees Department, American Federation of Labor, as the representative of each and all of the crafts of defendant's mechanical de-

partment employees, although two of said crafts failed to give a majority vote of eligible voters in favor of said System Federation No. 40, and although the certificate was issued more than thirty days after the services of the Mediation Board were invoked.

Defendant alleges that on November 19, 1934, subsequent to the transactions above recited, and by reason thereof, it sent a letter to the Mediation Board, explaining to the Board that it had a direct interest in the maintenance of friendly relations with its employees and consequently in the selection of the proper representatives of said employees with which it was to deal in matters affecting their rights in relation to their employment, setting out facts which lead it to believe that the Federation was not the choice of a majority of the employees in its mechanical department, or in the separate crafts composing such mechanical department, as their representative for the purposes of the Amended Railway Labor Act, stating that in its opinion the law does not justify or permit defendant to treat with representatives not properly chosen, and requesting the Board to take the action necessary to determine authoritatively the proper representative of its employees with whom the defendant could properly deal. Defendant has never received any reply to, or acknowledgment of receipt of, said letter, and the Mediation Board has never taken any action with respect to the request therein.

Defendant is informed and believes and therefore states that on December 1, 1934, the Independent Shop Crafts Association of Virginian Railway Company, a name lately adopted by the employees' organization formerly calling itself and known as Mechanical Department Association of the Virginian Railway Company and herein generally referred to as the Association, peti-
(56) tioned the Mediation Board to set aside its certificate of September 13, 1934, and to conduct a new investigation to determine the lawful representative of defendant's mechanical department employees for the purposes of the amended Railway Labor Act, and in support of said petition filed with the Board a letter reciting what were by petitioner deemed to be relevant and determinative facts. Defendant is informed and believes and therefore states that the Mediation Board has never

taken any action whatever in regard to said petition and supporting statements.

Defendant charges that the failure and refusal of the Mediation Board to take any notice of the aforesaid representations made to it by the defendant and by the said association was arbitrary and unfair.

Respondent alleges that Section 2, Fourth, of the amended Railway Labor Act in terms provides that "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act," and that Section 2, Ninth, of said Act provides, among other things, that in case of a dispute among employees as to who are the representatives of such employees, "it shall be the duty of the Mediation Board, upon the request of either party to the dispute, to investigate such dispute and certify to both parties in writing, within thirty days after the receipt of the invocation of its services, the name or names of individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier."

Defendant alleges that the National Mediation Board, in ordering that the election commenced on August 16, 1934, in accordance with lawful rules theretofore agreed upon by the parties and approved by the Board be set aside and annulled, and in ordering and requiring that (57) the new election of August 20, 1934, be determined by a majority of the legal votes cast, and in issuing its certificate based upon said last mentioned election, designating System Federation No. 40, Railway Employees Department of the American Federation of Labor, as the representative of defendant's mechanical department employees, violated its statutory duty, acted arbitrarily and contrary to both the express provisions and the manifest intendments of the Railway Labor Act as amended, and denied to the employees the right of choosing their representatives by a majority of the eligible voters in any craft or class entitled to vote, as required by Section 2, Fourth, of the Railway Labor Act, as amended. Defendant further alleges that said last mentioned election was conducted contrary to the provisions of said

statute, and that the certificate based thereon is a nullity because made without authority under the statute or under the Constitution and laws of the United States, and confers no legal right upon System Federation No. 40, Railway Employees Department of the American Federation of Labor, to represent the employees named in the bill of complaint or to represent any of defendant's employees in any of their dealings with defendant, and confers no authority upon said complainants to bring this suit on their own behalf or on behalf of any other employees who are employed by defendant in its mechanical department.

VII.

Defendant admits that certain correspondence took place between its officers and representatives of the said Federation in reference to a conference with the representatives of said Federation but denies that the true intent and purport of said correspondence is stated correctly in the bill. Defendant further says that as a result of this correspondence a meeting with the representatives of the said Federation was arranged and took place at Princeton, West Virginia on December 27, 1934. At this meeting, the representatives of the said Federation presented to defendant a proposed agreement which would transfer to said Federation the agreement theretofore entered into with the Mechanical Department Association of the Virginian Railway Company, but which (58) proposed agreement contained additional provisions not contained in said agreement with said Association, and particularly would have enlarged the scope of the existing agreement with said Association by including numerous employees not members of the crafts of the mechanical department of defendant. A copy of this proposed agreement is filed herewith as Exhibit Answer No. 4. Defendant refused to sign this proposed agreement.

Defendant denies that its course of conduct with respect to said Federation was intended to or did interfere with, coerce, or influence its employees in the choice of representatives.

VIII.

In answer to paragraph VIII of the bill, defendant denies that B. E. Nevins, or R. E. Britt, or Pond, or Hayes, either as the representatives of defendant, or on their own behalf, or in any capacity whatever, committed any of the acts there alleged.

Further answering this paragraph, defendant denies that C. R. Billmeyer is a "lead man" or a supervisor, acting or otherwise, in its mechanical department, or that he is any capacity whatever an officer of defendant. Defendant has no information concerning the things which said Billmeyer is alleged in this paragraph to have done.

Defendant denies that it, or Hayes, or any of its officers or agents, circulated, or caused to be circulated, or had any connection with the circulation of any application for membership in an organization known as Independent Shop Crafts Association of the Virginian Railway Company, or in any other employee organization. Defendant is informed that said Association was formed and organized by certain of its employees and asserts that the formation and organization of said Association was not brought about, or in any manner participated in, by defendant. Said Association claims to represent, and defendant upon information believes that it does represent and so states; a large majority of defendant's mechanical department employees, and defendant states that said Association has made demand upon defendant (59) that it be recognized as the representative of said employees.

Defendant denies all the allegations in this paragraph of the bill to the general effect that it coerced or influenced, or attempted to coerce or influence, its employees in the matter of their choice of representatives for the purposes there indicated. Defendant denies specifically the allegations that through its master mechanics, foremen, special agents, or other officers and employees, it circulated affidavits, applications, or petitions, similar to or of the same general character as the application for membership in the Independent Shop Crafts Organization of the Virginian Railway set forth

in this paragraph of the bill, or that it indicated to its employees in any way its preference as to representatives of its employees, or that it sought in any way to discredit the complainant Federation, or that it intends to do any of the said things in the future.

Defendant further denies that it committed any acts, as alleged in this paragraph of the bill, which were designed to or did inspire fear among its employees that their choice of the Federation as their representative would result in the elimination of their jobs or in their discharge or demotion; that it committed any acts which were designed to and did implant in the minds of its said employees the fear that defendant's management could and would ascertain which among its employees favored representation by the Federation, or the fear that said employees would be discriminated against in favor of employees represented by the Association; or that it committed any acts whatever with the intention of interfering with the free choice of representatives by its employees, or of influencing them in any way in that connection.

IX.

In answer to paragraph IX of the bill, defendant denies the allegations that it has violated the third, fourth, sixth and ninth paragraphs of Section 2 of the Railway Labor Act as amended June 21, 1934, and says that it (60) has violated no provision of said Act, and that therefore plaintiff is not entitled to the relief sought.

X.

Answering paragraph X of the bill, defendant says that inasmuch as it did not persuade, coerce, or influence its employees not to join complainant Federation, or to renounce representation by said Federation, it did not deprive the said complainants or any *any* of its employees of any important or valuable property rights as alleged in said paragraph. Defendant further denies that any of its employees will be deprived of any property rights by failure to join, or by failure to continue members of, said Federation, or by reason of any of the

matters and things alleged in said paragraph, and denies that the complainants, or any of them, or any of those in whose behalf the suit is claimed to be prosecuted, have any property rights in relation to the matters alleged.

Defendant specifically denies that any of its employees have been or will be deprived of the right to contract for their labor and services with defendant by means of collective bargaining through representatives of their own choice, or otherwise, but on the contrary affirms that its employees are now contentedly and willingly continuing in its service under the terms of the aforesaid agreement of November 15, 1922, which agreement was entered into by the employees in its mechanical department through the agency of a representative of their own free will and choice and which agreement has never been superseded, terminated, or changed with respect to any of the provisions therein, either in the manner prescribed in such agreement or in Section 6 of the amended Railway Labor Act.

XI.

Defendant denies that it has influenced, coerced, or intimidated any of its employees in an endeavor to cause them to breach agreements which they have entered into with said Federation to represent them in collective bar-
(61) gaining, or that it has influenced, coerced, or intimidated any of its employees to join or designate a so-called company union to represent them in collective bargaining.

Defendant further denies the right of complainants to seek or obtain from this court an injunction to restrain defendant from engaging in practices that have not existed in the past, and which do not now exist.

XII.

Defendant is advised and believes that in preceding paragraphs of its answer it has sufficiently answered each and all of the allegations repeated in paragraph XII of the bill concerning its alleged acts in connection with the subject matter of this suit and the alleged intendment

and effect of such alleged acts, and therefore now denies generally each and all of such allegations.

In further answer to paragraph XII of complainant's bill, defendant denies that complainants will suffer irreparable damages on account of anything that defendant has done, or is now doing, or intends to do in the future, or that complainants are without adequate remedy at law for their alleged grievances.

Defendant denies the statement in the bill "that a majority of all the five hundred and fifty (550) mechanical department employees of defendant railway company, herein referred to, really and sincerely desire the complainant Federation and its officers to act for and represent them in the pending matter and other matters concerning wages, hours of labor, and working conditions. ******" On the contrary, defendant says that the employees connected with its mechanical department consists of approximately 820 men, and that a large majority of said employees are not members of, or in any way affiliated with, said Federation, and do not desire or seek representation by said Federation.

(62) XIII.

In answer to paragraph XIII of the bill, defendant denies that complainants will suffer great and irreparable injury by the refusal of the court to grant the relief prayed for in the bill, and further denies that defendant will not be prejudiced or damaged by the granting of such relief to the complainants. On the contrary, defendant says that it has already suffered and is now suffering serious injuries, and serious damages on account of the continued agitation by complainants and their organizers of the question of representation for the different crafts of defendant's mechanical department employees. Defendant says that since some time in July, 1933, the complainant Federation, its officers, agents, and organizers, have, on divers occasions, and by acts or coercion, and influence, and by threats, sought to disrupt the long standing, friendly, and contractual relations existing between defendant and its employees, and have coercively sought to procure from said employees their consents or authorizations empowering said com-

plainant to represent them for the purpose of collective bargaining, by all of which acts of said complainant the efficiency of defendant's employees in its mechanical department has been seriously impaired. Defendant further alleges that all of these acts have been committed by the complainant Federation, its officers and organizers, in contravention of the rights of the defendant and its employees.

Defendant denies all allegations of the complainant's bill of complaint not herein specifically admitted, and defendant having fully answered the bill of complaint, prays that the relief asked for in the bill of complaint be denied; that said bill of complaint be dismissed; and that defendant may have and recover of the complainants its reasonable costs about its defense in this behalf ex-
(63) pended. And defendant will ever pray, etc.

THE VIRGINIAN RAILWAY COMPANY,
By W. H. T. LOYALL,
General Solicitor.

W. C. PLUNKETT,
Asst. General Solicitor.

OLIVER & DONNALLY,
HALL, BUFORD & LEFTWICH,
Counsel.

Exhibit Answer No. 1 filed herewith is the Agreement
(64) dated November 15th, 1922, between The Virginian Railway Company and the Mechanical Department Association, portions of which are included in the record as Defendant's Exhibit "R" page 244.

Exhibit Answer No. 2 filed herewith is the statement
(65) of J. W. Sasser, dated July 11th, 1934, as set out in the record as Complainants' Exhibit No. 1 page 197.

Exhibit Answer No. 3 filed herewith being the Rules
(66) and Regulations for election to be held on August 16th, 1934, is set out in the Record as Complainants' Exhibit No. 2 page 201.

(67) **EXHIBIT ANSWER NO. 4.**

Memorandum of Agreement Between the Virginian Railway Company and all class of employes represented by Virginian System Federation No. 40, Railway Employes' Department, American Federation of Labor, (namely, Machinists, boilermakers, blacksmiths, sheet metal workers, electrical workers, carmen, and helpers and apprentices of the foregoing, coach cleaners, power house employes, linemen, mechanics and helpers employed at coal piers and in water service department, performing work as generally recognized as coming under the foregoing crafts).

IT IS AGREED that the Agreement between the Virginian Railway Company and Mechanical Department Association of the Virginian Railway Company shall be taken over and become the agreement between the Virginian Railway Company and Virginian System Federation No. 40, Railway Employes Department, American Federation of Labor. The caption to be changed to read:

AGREEMENT

between the

Virginian Railway Company

and

Virginian System Federation No. 40, Railway Employes Department, American Federation of Labor,

Comprised of

International Association of Machinists
International Brotherhood of Blacksmiths, Drop Forgers and Helpers,
International Brotherhood of Boilermakers, Iron Shop Builders and Helpers of America,
Sheet Metal Workers International Association
International Brotherhood of Electrical Workers
Brotherhood Railway Carmen of America.

(68) SCOPE OF AGREEMENT

It is understood that this Agreement shall apply to those who perform the work specified in this Agreement and work generally recognized as coming under the craft of the above mentioned class of employes, in the maintenance of Equipment, Maintenance of Way, Signal Maintenance, Telegraph Maintenance and all other departments of the Virginian Railway Company where work covered by this agreement is performed.

IT IS AGREED that the present rates of pay established in conference or otherwise and the rules governing working conditions as set forth in the current agreement with the Virginian Railway Company will continue in effect until changed in accordance with the Amended Railway Labor Act.

IT IS FURTHER AGREED that the Washington Agreement of April 26, 1934, signed for the railroads by the Conference Committee of Managers and for the organizations comprising the Railway Employes Department of the American Federation of Labor by the Chief Executives of the said organizations, will apply to the class represented by Virginian System Federation No. 40, Railway Employes Department, American Federation of Labor, on the Virginian Railway Company.

IT IS AGREED that all provisions of existing Agreement, which are not in accord with the Amended Railway Labor Act, will be construed to come within the Act.

The signing of this Agreement is without prejudice to either party's position with respect to the acceptance of principles contained in the agreement, and by their acceptance temporarily of the rules thereof, will not be used as a precedent in any future negotiations held any
(69) where; and Further, that the rules will be applied regardless of past practices or understandings in accordance with the meaning of the language used, and that the Agreement will be subject to amendment on thirty days notice.

NARRATIVE STATEMENT OF THE EVIDENCE

(70) Filed Dec. 17, 1935.

Mr. Mulholland: I will offer as Exhibit No. 1 a Statement to the Members of Mechanical Department Association of the Virginian Railway Company on Employee Representation, issued July 11, 1934, by J. W. Sasser, Superintendent of Motive Power of the Virginian Railway; I offer as Exhibit No. 2, two papers, the first being a notice of election to be held under the Railway Labor Act, involving shop craft employes and the Virginian Railway Company; the second page being a copy of the official ballot posted for use in the election. Exhibit No. 2 are the documents that were issued by the mediator prior to the commencement of the taking of the ballot in Princeton. That election was stopped in Princeton on the first day that they commenced taking a vote.

I offer as Exhibit No. 3 the agreement made on the 18th day of August, 1934, between the Railway Employes Department of the American Federation of Labor, through C. L. Bentley, and the Mechanical Department Association of the Virginian Railway Company by its representative J. W. Munsey and witnessed by R. B. Bronson, Mediator. The second paper attached to Exhibit No. 3 is an agreement dated at Princeton, August 18, 1934, signed by the Virginian Railway Company by J. W. Sasser, Superintendent of Motive Power, by the Railway Employees Department No. 2, American Federation of Labor by C. L. Bentley, and by the Mechanical (71) Department Virginian Railway Company by J. W. Munsey, General Chairman. Also included in Exhibit No. 3 is an agreement dated at Princeton, August 18, 1934, signed by the identical parties last named. Attached also to Exhibit No. 3 is the second notice of an election to be held under the Railway Labor Act, involving shop craft employes of the Virginian Railway Company, and attached thereto is also a copy of the official ballot.

I offer as Exhibit No. 4 the certification of the election and of representation on the Virginian Railway Company, involving its Mechanical Department employes, is-

sued by the National Mediation Board under date of September 13, 1934.

I offer as Exhibit No. 5 a letter dated September 21, 1934, addressed to Mr. C. Bucholtz, President of the Virginian Railway Company, by the Executive Board of System Federation No. 40, Railway Employes Department of the American Federation of Labor, its several general chairmen, and W. H. Gorman, representative of the Railway Employes Department of the American Federation of Labor.

I offer as Exhibit No. 6, a letter dated at Huntington, West Virginia, October 5, 1934, addressed to Mr. C. Bucholtz, President of the Virginian Railway Company, by Mr. W. H. Gorman, representative of the Railway Employes Department, American Federation of Labor.

I offer as Exhibit No. 7 a letter dated October 12, 1934,
(72) addressed to W. H. Gorman by President Bucholtz of the Virginian Railway Company, and attached thereto is a letter dated September 29, 1934, addressed to Mr. E. R. Belcher and signed by Mr. C. Bucholtz.

I offer as Exhibit No. 8 a letter dated October 12, 1934, addressed to Mr. William M. Leiserson, Chairman of the National Mediation Board, Washington, D. C., and signed by C. Bucholtz, President of Virginian Railway Company.

I offer as Exhibit No. 9 a letter dated October 15, 1934, addressed to Mr. C. Bucholtz, President of the Virginian Railway Company, signed by George A. Cook, Secretary, who is Secretary of the National Mediation Board.

I offer as Exhibit No. 10 a letter dated October 19, 1934, addressed to Mr. B. M. Jewell, President of the Railway Employes Department, American Federation of Labor, and signed by C. Bucholtz.

I offer as Exhibit No. 11 a letter dated November 5, 1934, addressed to Mr. C. Bucholtz, President and signed by W. H. Gorman.

I offer as Exhibit No. 12 a letter dated November 9, 1934, addressed to Mr. E. R. Belcher and signed by C. Bucholtz, President.

I offer as Exhibit No. 13 a telegram dated at Huntington, West Virginia, November 12, 1934, addressed to C. Bucholtz, President, signed by W. H. Gorman.

I offer as Exhibit No. 14 a telegram dated November
(73) 13, 1934, addressed to W. H. Gorman and signed by W. D. Baker, Assistant to the President of Virginian Railway Company.

I offer as Exhibit No. 15 a letter dated November 19, 1934, addressed to Mr. E. L. Preston, Princeton, West Virginia, and signed by C. Bucholtz, President.

I offer as Exhibit No. 16 a letter dated November 19, 1934, addressed to Mr. C. Bucholtz, President and signed by W. H. Gorman, representing the Railway Employes Department of the American Federation of Labor.

I offer as Exhibit No. 17 a letter dated December 17, 1934, addressed to Mr. E. R. Belcher by C. Bucholtz, President.

Mr. Brandt: If your Honor please, we do not wish to waive in any way our contention that the issuance of the certification by The National Mediation Board is binding and conclusive insofar as the selection of the representative of the employes of the Virginian Railway Company is affected.

The Court: If I understand it correctly, what they want is the right to introduce evidence without waiving the point that you cannot question that certification. You may proceed with that reservation.

J. W. Sasser, a witness called by the plaintiffs, testified
(74) as follows:

Examined by Mr. Mulholland:

My name is John William Sasser. I reside at Princeton, West Virginia. My official position with the Virginian Railway is Superintendent of Motive Power, and I have held that position continuously for going on sixteen years. As such Superintendent, I am the chief officer

over the employes in the Mechanical Department. The Master Mechanics, shop superintendents, in some cases the mechanical engineers, chief clerk to superintendent of motive power are under my direct supervision. The President of the Virginian Railroad and his two assistants are superior officers to me and have authority over me. Exclusive of those three officers I am the supreme authority so far as Mechanical Department is concerned. I was on the system at the time of the election held for the purpose of selecting representatives of the Mechanical Department employes. That was the first election on the 16th of August, 1934, Just a few days prior to the holding of the election a Mr. Bronson of the National Mediation Board contacted me. I met him at the Terminal Building in the President's office, that is in the Board Room at the President's office. There were present besides Mr. Bronson and myself, Mr. Markham and Mr. Bentley. It seemed that the ar-
(75) rangements for the taking of a secret ballot of employes of the Mechanical Department had practically been made. Mr. Bronson had the rules of election and wanted this election held as soon as possible. They did on the 16th of August, start taking votes in Princeton. And on that same day they ceased taking ballots in connection with that election until Monday. The rules for the election were signed in Norfolk. I never signed them at all. I was in the Board Room at the time the rules were drawn up. My name was on that agreement, but I never signed it at all. My name was signed by Mr. Bronson. On the 18th day of the same month an agreement was prepared and signed by certain parties for the taking of an election, after the vote was stopped at Princeton. I do not think I was present at the time it was drafted but I read it over before it was posted, that is Exhibit No. 3 filed in this case which you now show me. I had knowledge in advance that this agreement was to be posted as the rules governing the election of the Mechanical Department employes of our railroad; I was asked by Mr. Bentley to sign that. I do not remember signing the page containing certain interpretations or additions attached to Exhibit No. 3, dated Princeton, August 18, 1934, to which you call my attention. I refused to sign the first paper you showed me. I was asked to sign it but I advised I would not be a party to those rules. I think I did sign this other page attached

to Exhibit No. 3 dated the same day whereby it is agreed between the undersigned that the following bulletin will (76) be posted by the Superintendent of Motive Power of the Virginian Railway Company on the various bulletin boards at all points where elections are held. Again directing my attention to the first document you called my attention to I still feel that I do not remember signing it. This is my signature on this other paper which you now hand me. Upon comparing that with the other document and having refreshed my recollection I will say I signed both the documents which you called my attention to.

Mr. Mulholland: I would like to read these into the record. The first document is dated Princeton, August 18, 1934, and reads: "It is hereby agreed between the undersigned that 'Valid reasons' designated in the last paragraph of the bulletin posted by the Mediator shall be approved by the Mediator before the employe is permitted to vote." It is signed The Virginian Railway Company by J. W. Sasser, Superintendent of Motive Power; The Railway Employes Department Division No. 2 American Federation of Labor by C. L. Bentley; The Mechanical Department Virginian Railway Company by J. W. Munsey, General Chairman.

The second document to which I called the witness' attention reads: "Princeton, West Virginia, August 18, 1934. It is hereby agreed by the undersigned that the (77) following bulletin will be posted by the Superintendent of Motive Power of the Virginian Railway Company on the various bulletin boards at all points where elections are held. Notice; all eligible employes will be given a chance to vote between the hours designated and conforming to the bulletins of the Mediator, and under no conditions will the men be kept away from the polls for reasons of work assigned to them." It is signed The Virginian Railway Company by J. W. Sasser, Superintendent Motive Power; The Railway Employes Department, Division No. 2, American Federation of Labor by C. L. Bentley; The Mechanical Department Virginian Railway Company by J. W. Munsey, General Chairman.

I signed those two documents on the same day that the agreement for holding an election was executed by the respective parties, and that was on the 18th day of

August, 1934. I did not post them myself. They were posted in accordance with the provision of the agreement. The election was held under those election rules that you referred to on the first page. I was present at all the various points when the election was being held. I did not have ample opportunity for observing what was going on; I was not present at the polls at any (78) place while they were voting. I arranged booths, voting places, and ballot boxes and that was the purpose of my trip over the railroad. I was asked by Mr. Bentley and also by the Mediator to accompany them on this trip and to arrange to have those places arranged, and to assist them in carrying on this election. What they wanted me to do as Superintendent of Motive Power was to arrange voting booths so that this election could be held absolutely fairly and in a secret way. I made the arrangements at Princeton. The arrangements there for the actual physical casting of the ballots were: In the first place we arranged the ballot box; then we arranged for tables, desks, writing pads, pencils, etc., and chairs, and arranged those in a place where it was not public, the wash room, and this place was approved by the Mediator, by Mr. Bentley, and by all concerned. And nobody was allowed to go in there, none of the officials, during voting hours, but the Mediator wanted information from time to time and I did go in this place while there was no voting going on. I erected booths at Princeton. The booths were arranged the same as in any other election so that a man could come in and vote without anyone looking at his ballot. The next point I visited was Herndon. We did not make any arrangements there only we arranged for the box so they could vote. There were only a few men there; four or five men. From there I went to Mullens, West Virginia. (79) The arrangements made there for the casting of the ballots were about the same that was made at Princeton. We had the ballot boxes and we had the private booths where the men could go and vote secretly; we had an office set aside for them and desks and all available facilities. I next went to Elmore and the arrangements made there were the same thing. From there I went to Narrows and there we just turned the office over to them, about the same as we did at Mullens. I then went to Roanoke, Victoria, Sewalls Point Coal Pier, and Sewalls Point Round House. At all these points, I ar-

ranged a set-up that would enable the secret voter to cast his secret ballot and, as far as I know we satisfied the Mediator. We suggested places. Then we left that place and left them alone so they could send down and get the men and vote them as they saw fit. I do not remember the date when Mr. Bronson, the Mediator, first came on the property. It took a few days to count the votes. I do not know when and where they counted the ballots. I don't think they counted the ballots at each town; I think they brought the boxes to Norfolk at the hotel and counted them. I was with the Mediator possibly five days altogether, counting the time in Norfolk. I was requested to be with him in my official capacity as Superintendent of Motive Power and all of these matters I performed in my position.

I signed my name to Exhibit No. 1, which is a state-
(80) ment to the members of the Mechanical Department Association of the Virginian Railway Company, and arranged for its being circulated to the employes of our railroad. It was sent to various points and usually turned over to the officers of the Association. I do not remember how many of those we printed. I don't remember the number. We did not have any too many because a great many people in other departments wanted them. At Princeton, where I live, the distribution at that point was made by turning over a sufficient number of those to Mr. Hearne for the Car Department, and a sufficient number for the other departments. Mr. Hearne is the Chairman of the Carpenter's Association, representing the Mechanical Department Association. I would not be a bit surprised if the Foreman handed those out as the men checked out. I did not see them do it, but I would not be surprised. They were printed to go in the hands of the employes. We wanted each employe to get a copy of that. There was a great deal of friction and rumors circulating around by the American Federation of Labor that the men would be dismissed if they did not vote a certain way, and I was requested by the men to set the facts before them. I was requested by a fellow named Hilton and a fellow named Bushy to put the real facts before them instead of having the men blindfolded and being run off because they would not join the American Federation of Labor. Hilton was a carpenter at Princeton and Bushy worked at Princeton. I was a party to writing this pamphlet. I don't re-

member all of the committee now who assisted me. I (81) was a party to the preparing of it. This pamphlet was not written out in full and brought to me for my signature but I attended, as near as I can remember, three meetings. The President of the Railroad was there, Mr. Markham was there, Mr. Loyall, Mr. Hall and I don't remember who else. In other words a group of railroad officials assisted me in preparing this pamphlet. I put my name to it and then did my best to get it circulated among the employes of the railroad. I think Mr. Loyall and the others remember my calling their attention to the dissatisfaction existing among our employes due to those rumors or threats and coercion by the American Federation of Labor, advising those men that they would be dismissed from the service and telling them they would have to join anyhow and they could join then for $5 instead of $25. I just told you the reason why that pamphlet was issued. I knew at that time that the men were trying to organize into the local unions affiliated with the nationals, or part of the American Federation of Labor.

Q. You knew at that time that the men were organizing into the local unions affiliated with the nationals, or part of the American Federation of Labor, didn't you? A. I knew they were trying.

Q. This was in 1933 following the enactment of the Emergency Transportation Act? A. That was 1933, wasn't it? That was before the Act.

At the very time I issued this pamphlet, a Mediator (82) representing the old Board of Mediation was in my office checking the payroll with the Association, but the pamphlet was framed, and I suspect written up before the Mediator ever came to our line. I do not remember whether a Mediator of the old Mediation Board was in my office checking up the payrolls at the time I was circulating this over our system; I don't remember the date he was down here. This is dated July 11, 1934 and was circulated shortly after the date, but I don't remember the date the first Mediator was on our Line.

Q. You are telling the Court that the issuing of this pamphlet had no relation in your mind to the fact that the individual employes on your railroad were organiz-

ing a standard labor organization? A. The reason—
Q. (Interposing) Answer the question. A. I am going to answer your question this way, as I did before. The reason for issuing that was to set our employes straight. They were threatened and coerced to the point that there was a great deal of dissatisfaction in our shops and had requested they be set straight and the wording of the pamphlet was to set the men straight.

I don't know the name of any man that was coerced on our railroad. I don't know the name of any man that coerced anybody. I just told you Mr. Hilton and Mr. Bushy, and others came to me advising me of those facts, and that is the reason that bulletin was gotten out. I am located in Princeton but the law don't let me go out and interfere with those things. I heard the men were being coerced and without making any further inquiry, I issued this pamphlet. I did not say the issuance of this pamphlet did or did not have anything to do with the fact that there was a Mediator on the ground and (83) that there was a controversy here and he was trying to adjust it, but I gave you the reasons I got out the pamphlet. None of the men I mentioned as coming to me and asking me to get out the pamphlet were supervisors or foremen; they were workmen. When they asked me to get out a pamphlet I reported to the President and we all got busy. We had our General Counsel in on it because we thought best with the law that was confronting us to be on the safe side of those things. After the men came to me and asked me to write the pamphlet I don't remember what I did, that is, in details all the way through, but that is the result of that request. I don't know exactly how it happened that the President and the General Counsel, the Vice President and the Superintendent of Personnel all got in on writing this pamphlet, but, of course, we keep the President and all concerned advised of the conditions in our shops. If we have anything that is causing our work to fall off we take it up with him. If we have any friction in the shop or any turmoil that may cause any condition of that kind, the President is advised.

No cross-examination at this time.

William H. Gorman, a witness for the plaintiffs, testi-
(84) fied as follows:

Examined by Mr. Mulholland:

My name is William H. Gorman, I live at Clifton Forge, Virginia. I am General Chairman of the Machinist's Organization on the Chesapeake & Ohio Railroad, which is affiliated with the Railway Employes Department of the American Federation of Labor. In other words, the office that I hold is that of Craft Chairman on the Chesapeake & Ohio Railway. I became interested in the controversy on the Virginian Railway after we received requests from the employes on the Virginian Railway. I held a meeting at some points along in the latter part of 1933, or I guess it was the early part of 1934; that was the first. Our International President, Mr. A. O. Horton, and also President Jewell of the Railway Employes Department assigned me to go over and help out the Virginian. They had requested assistance of the Railway Employes Department. At the time Mr. Bronson, the Mediator for the National Mediation Board was in Norfolk arranging the agreement for the election, I was here in Norfolk on other business. My jurisdiction as one of the employes' officials on the C & O brings me into Norfolk. The C & O runs into Newport News. I was not present at any of the conferences prior to the preparing of the contract or rules for holding the election. After the election was held I received a copy of the cer-
(85) tification of the National Mediation Board, which is marked Exhibit 4 in this case. I signed Exhibit 5, which is a letter dated at Princeton, West Virginia, September 21, 1934, and it was signed by the respective General Chairmen of System Federation No. 40, in my presence. After the letter was signed by the respective parties, we then mailed it by special delivery to Mr. Bucholtz on the same day of the letter. That letter was addressed to the President of the Virginian Railway for the purpose of arranging a conference under the provisions of the certification of the Board of Mediation. I did not get an answer from that letter: I traced him on it. I wrote the letter marked Exhibit No. 6, dated October 5, 1934. I received Exhibit No. 7, which is a letter dated October 12, 1934, addressed to me by Mr. Bucholtz. What

actually happened was we men wrote and asked for a conference to discuss those matters and we did not get an answer and we wrote another letter and then Mr. Bucholtz wrote me this letter of October 12, with which he enclosed a copy of a letter he had addressed to Mr. Belcher. In our letter of the 21st we requested Mr. Bucholtz to direct the reply to me and also to Mr. Belcher, but I did not hear from him.

I made further efforts to try to contact the officials of the Virginian Railway Company after the certification was issued by the National Mediation Board. I was in-
(86) structed by the Railway Employes Department as their representative to go on the road and assist these general chairmen in securing a conference. After we addressed this letter to Mr. Bucholtz and he, in reply, put us off from time to time, the question was of course referred back to the National Board of Mediation. They again reaffirmed their original certification by telling Mr. Bucholtz that the Board had issued this certification in accordance with the law. Then Mr. Bucholtz wrote Mr. Jewell, President of the Railway Employes Department, setting a tentative date for November 14th. After I received notice of that from Mr. Jewell I acknowledged receipt through a letter to Mr. Bucholtz telling him I would arrange to have the committee meet him on that day. In the meantime, on the 9th of November, Mr. Bucholtz ignored my letter and notified Mr. Belcher that he would have to postpone the conference. Then I wired Mr. Bucholtz on the 12th that I would arrange to call at his office with the committee on the date specified by him, which was the 14th. When I called at his office, I was informed by Mr. Baker that he had wired me but I did not receive the wire, because I notified him I was leaving Huntington, West Virginia, that night. The date he answered it I was here in Norfolk and therefore I did not receive his wire. So, I called at the office and they informed me that Mr. Bucholtz was out on an inspection trip and would not be back until the 17th. We called again on the 17th to see him and Mr. Baker again informed us that he was in a very busy conference
(87) and that there would be no chance for us to see him. We waited over then until Monday. That was the 19th of November. We again went to Mr. Bucholtz's office and requested a conference with him and at that time he addressed a letter to Mr. E. L. Preston who was

accompanying me at this meeting, in a way criticizing him because he had called at the office, and to the effect that he could not set a definite date when he would meet us. During that same time or that same day Mr. Sasser and Mr. Oliver, the attorney for the Virginian Railroad, called Mr. Preston in a side office and asked him some questions about these violations, and Mr. Preston informed them that I was the representative of the men, the spokesman for them, and they would have to see me. They hesitated and finally called me in and stated to the effect that the only authority they had was to ask me what these violations were; they had no authority to confer with me on anything else. After a brief conference we went on back to the hotel. Then I wrote Mr. Bucholtz again in reply to his letter to Mr. Preston, calling his attention to the law and that he had ignored me all the way through and that the law specified that the representative may be other than an employee of the Virginian Railroad, and I quoted the law in this letter. Then, later he suggested and notified us when he would meet us, that was on the 17th of December, he wrote a letter again (88) to Mr. Belcher telling him he would arrange a conference and meet us in Mr. Sasser's office in Princeton, on December 27th; still ignoring me, notwithstanding the fact that I was the one who was writing him all the time. This conference was held in Mr. Sasser's office and at that conference Mr. Oliver was the representative of the Virginian Railroad. Mr. Sasser was present, and also Mr. Markham. Mr. Oliver is one of the attorneys for the Virginian Railway. At the beginning of the conference, Mr. Oliver made a statement to the effect that they regretted that Mr. Bucholtz was ill on account of ptomain poison and would not be able to attend the conference, and he asked me "Do you desire the conference postponed?" I said, "If you have authority to speak for the Virginian Railroad it is all right with me. We are ready to go on with the conference." We discussed the different questions, explained our thought was to establish the organization on the property and if either party desired to change they would give the thirty days notice required under the amended Railway Act. We discussed the various phases of our proposed memorandum agreement. The Virginian had a court reporter who took down what transpired in the meeting. Mr. Oliver led me to understand that we would be furnished with a

copy of the proceedings. Of course, we never were furnished with a copy. At the conclusion Mr. Oliver stated, "Well now, we have no authority to agree to anything." (89) He says, "We are just here representing Mr. Bucholtz and Mr. Bucholtz will let you hear from him as to when he can meet you again". Well, from that on we have never been able to secure a conference with Mr. Bucholtz one way or the other.

Coming back to that conference held in Princeton, there was a delegation there the same day we were there. After we met in Mr. Sasser's office, Mr. Oliver stated, "The Mechanical Department Association are contesting this and they have their attorney here. Do you object to them sitting in?" I replied to Mr. Oliver to the effect that we had been duly designated as the representatives of the employes on the Virginian Railroad and therefore that we were the only ones that had authority to speak for them. He says, "I feel I owe him the courtesy to let him come in and make his statement". He called him in. He was accompanied by some of the men representing the Mechanical Association, and this gentleman who was representing the Association was an attorney of Princeton. After he finished his statement Mr. Oliver said to me in his presence, "Mr. Gorman, do you object to this gentleman sitting in here?" I said, "As a representative of the employes I do, as we are the representatives of the employes in accordance with the certification of the National Mediation Board." Mr. Oliver in turn notified the attorney for the Mechanical Department Association, "We will have to excuse you (90) gentlemen." Then we went into the conference which I have just cited to you that took place at this particular time.

I first endeavored to contact Mr. Bucholtz on September 21, 1934, the date of that letter. I have never been able to contact him personally at all. Exhibit No. 15 is the letter that was handed to Mr. Preston in the office down here in Norfolk when we were trying to see Mr. Bucholtz. That is a copy of the letter.

Mr. Mulholland: This letter I would like to read: (Reading); "Norfolk, Va., November 19, 1934. Mr. E. L. Preston, Princeton, West Virginia, Dear Sir: With further reference to Mr. Belcher's letter of September 21, 1934, requesting a conference with the Virginian Rail-

way, which I understand you desire for the purpose of transferring the existing labor contract of the Mechanical Department Association to the Railway Employes Department of the American Federation of Labor.

"Under date of November 9th I advised Mr. Belcher at Princeton, West Virginia, of the postponement of the conference which had been tentatively arranged for November 14th. I understand from my office force that you have disregarded this request and have been in my office daily beginning with November 14, in spite of my advice to you that conditions were such as to prevent a conference at the present time.

"I have also been notified by representatives of the (91) Mechanical Department Association of the Virginian Railway that a majority of our employes are not in favor of representation by the A. F. of L. and have demanded the right to participate in any conference which may be held relating to a labor agreement, claiming that there were irregularities in the election of August 20. Fair treatment requires that the representatives of the Mechanical Department Association of the Virginian Railway have an opportunity to have their rights in the matter properly considered and determined.

"It is impracticable for me to set a definite date for a meeting until this and other matters in connection with the situation have been clarified.

"I am sending a copy of this letter to the National Mediation Board at Washington, D. C. in order that they may be fully advised of the situation. Yours very truly, signed C. Bucholtz, President."

The election was August 18, 1934 and the date of the certification of the Board was September 13.

CROSS EXAMINATION

(92) By Mr. Hall:

I live at Clifton Forge. I am employed by the C. & O. Railroad Company, that is I hold rights on the C. & O. I am on leave of absence while I am representing the organization. I am directly employed as General Chairman of System Federation of the Machinists Organization on the C. & O. Railroad. I first came on the Virginian in the last part of 1933 to organize the Federation. I said I came there by request. I will explain that: I

am under the jurisdiction also of our international organization. They pay part of my salary and I am subject to their instructions also, so I was requested by our International Officers to come over and assist. The men on the Virginian Railroad had made a request through our International Officers. I would not say I have the letters, but I know I have seen—I could not say without looking up the files that I have the letter making such request, but I received the letter personally myself, also wires requesting me to go over on the Virginian Railroad. Charlie Welch, at Mullens, was one of the first that requested me to come over there and hold a meeting. He was a Machinist, employed by the Virginian Railroad. So I went over and held meetings at various places on the Virginian in an effort to assist those men in organizing the Federation on the Virginian. J. W. (93) Sebold, General Chairman of the Car Men on the C. & O. Railroad accompanied me on most of those meetings. He is not present here. He is employed by the C. & O., that is he holds rights on the C. & O. He represents the Car Men's Organization. There was no Virginian employe accompanied us at that particular time. We would just come in and address the meeting and hold meetings at the local points. J. W. Munsey never did accompany me to any of those organization meetings. He did not go with me and Mr. Sebold to Victoria in an effort to organize the employes there. He may have been present at a meeting we held at Princeton, but that is the only meeting, if he was present, that I know of. He was not present at any other point on the road that I recall at a meeting. I do not remember that Mr. Munsey was present at the meeting at Princeton and acted as Secretary of the meeting and that he solicited membership in the Federation at that meeting.

I was in Norfolk when Mr. Bronson, the Mediator was first here. That was along in the first part of August, 1934. That is when they were arranging for the election. I did not even contact him. I just happened to be here. I did talk with Mr. Bentley; I met him on the street. But I was here on other business. I was not here with Mr. Bronson about the 4th of June, 1934, when he was sent out by the old Mediation Board as a Mediator. I was not here with him on the second trip when he was (94) sent here by the Mediation Board organized un-

der the Act of June 21, 1934. I was not with him here at all. I was in no way in contact with him at all, in regard to the election on the Virginian Railroad.

It was on Monday, November 19th, when I was here in an effort to contact the Virginian Railway Company officials that I said Mr. Preston and myself talked with Mr. Sasser in regard to certain violations of the Railway Labor Act. Besides Mr. Sasser, Mr. Oliver talked with us; he was the spokesman for the railroad. The violations we were asked about were violations referred to in my telegram of November 12th, marked Exhibit No. 13. In this telegram I say, "Accompanied by committee will call at your office November 14 for conference in order that we may lay before you what has happened on the Virginian Railroad, violation Railway Labor Act." When I was called in and talked with Mr. Oliver and Mr. Sasser we were asked what violations I referred to in that telegram. And that was all the information that they sought to obtain from me. They told me in that conference that if I knew of any violations that they wanted information so they could take measures to prevent any violations of the Railway Labor Act. I did not decline in that conference to specify any violations that I referred to in that telegram, only I briefly referred to some violations in Victoria in regard to affidavits that were circulating through the office after the election oc-
(95) curred.

At this conference in Mr. Sasser's office, I presented a contract that we wanted; it was not in a form ready to sign. I told him it was a tentative proposition. Mr. Oliver said, "We would like to know just what is on your mind, what you have in mind." I said, "We have drawn up a tentative proposition to give you some idea of what we want to agree to." And he asked me to present him with a copy. I presented him with several copies. He said, "We will have to take this back to Mr. Bucholtz and have him pass on it and he will let you know when there will be another conference held." We submitted that paper that we wanted the Virginian Railway Company to accede to: That is, in the form of negotiations. That was a tentative proposition, or something to negotiate on.

This paper filed as Exhibit No. 4 with the Virginian Railway Company answer is the agreement that we pre-

sented at the conference at Princeton. That was a tentative proposition to be used as a basis for negotiation. That was really the thought in mind. Of course, if they desired to change any certain language in it, we would negotiate those questions. It is headed "Agreement" and if the Virginian had been agreeable to it we felt that would take care of all we wanted. At the end of that conference Mr. Oliver told us that before the Virginian Railway Company could sign this paper or agree with those provisions he wanted to take up and discuss the (96) matter with Mr. Bucholtz. That is what he gave us to understand and that Mr. Bucholtz would let us know when he would meet us again. He did not give us to understand that he would let us know whether he would consent to this agreement and sign it. We tried to leave the impression with him that that was just like you are submitting any negotiations, you submit a tentative proposition for the basis of negotiations. My understanding was, at least, and I think the Committee understood the same way, that we would meet him again and then discuss the different phases of that memorandum for the purpose of signing it. I do not know of any subsequent conference with reference to that agreement; that is the only conference the Committee representing the Railway Employes Department held.

I said Mr. Oliver said to me that he would furnish me a copy of the report of the proceedings of that meeting: he said it is this way: He read certain letters into the record and he says, "You will be furnished with copies of these letters." That was his words, and it gave me to understand as they were read into the record that we would be furnished with a copy of the records as they were taken in that meeting. Those letters had dealings with the protest by the Mechanical Association. That is what I recall they had reference to. He had a letter there from the Mechanical Department Associ- (97) ation, or whatever you call it, protesting against making any contract with us, and also the reply of the Virginian Railway Company to that letter and he read those letters and they were made a part of the record of the conference. He did not furnish us copies of those letters. He stated we would be furnished, but he never furnished them. I did not ever request copies of them because I was expecting from time to time another con-

ference and I thought he would present them at that time. I never particularly traced him on those.

RE-DIRECT EXAMINATION

On cross-examination I was asked about a violation that I discussed with Mr. Oliver, which had occurred at Victoria. The affidavit was circulated there by the supervisor of the shops. The paper which you show me and which you have marked Exhibit 18, is a copy of the affidavit to which I refer. The complaint I referred to was to the supervising official circulating that affidavit.

RE-CROSS EXAMINATION

I did not pay any particular attention to the date of that affidavit. There is no date on this copy that I received. I don't know whether any of them were dated or not. All I know about that affidavit is that somebody produced that copy and gave it to me and I got the in-
(98) formation from somebody that that had been circulated at Victoria; that is all I know. I don't know who circulated it, or who inspired it or what the circumstances were that brought about the making of that affidavit. The only information I had was that it was handled strictly through the company's office and the Notary Public was a Clerk to the Master Mechanic at that point. He was the one as Notary Public signing these for the men after they made them out. I had that merely as information. Several of the men told me that at that point, I don't know it of my own knowledge, of course, I did not see it.

John W. Munsey, a witness for the plaintiffs, testified as follows:

Examined by Mr. Mulholland:

My name is John Wesley Munsey. I reside at Princeton, and have resided there ten years and eleven months. My present employment is Machinist with the Virginian Railway Company. I am a married man with a family. I have been employed as a Machinist by the Virginian

for ten years and eleven months and I am working there now. I was in a way a member of the Mechanical Department Association that you refer to as commonly called the Company Union. I never signed any application (99) for membership, I never paid any dues into the Association and I never attended any meetings of the Association other than those called biennially to select the officers. During the period of my employment the meetings held in Princeton, of the Company Union for the purpose of nominating the officers were held in the shops on the company property. My craft, the Machinists, hold their meetings in the Air Room. I am not an Air Room employe, but an employe of the Machine Shop. I did hold the offices of Craft Chairman and General Chairman in the Mechanical Department Association. As Craft Chairman, I represented my particular local craft of Machinists, and as General Chairman the System over all crafts. I had supervision as General Chairman, not only over the machinists, but the boilermakers, sheet metal workers, blacksmiths, carmen and the other crafts. I was elected General Chairman October 3, 1933. I was selected as General Chairman by the six Craft Chairmen. The way we elect our Craft Chairmen, and how the Craft Chairmen form the System and elect their System officers is there is a nomination. Two men are nominated. The man receiving the highest vote in his craft is considered the Chairman of the Craft. The man receiving the next highest vote is considered Secretary for that Craft, and the six Craft Chairmen get together afterwards and select one of those six chairmen as the (100) General Chairman. So I became General Chairman for the System in 1933. I have held that office since October, 1933, up until the present time so far as I know. So far as I know, since I was selected General Chairman in 1933, there has not been any meeting of the so-called members of the Shopmen's Association. So far as I know, no one has ever paid any dues. In holding our elections we have a ballot. Since I have been there, my understanding is that the company has those ballots printed. There was never to my knowledge any money in the treasury of the Association since I was elected General Chairman. We had a Treasurer; General Chairman, Vice Chairman, Secretary and Treasurer.

Shortly after I was elected General Chairman I had

occasion to take up with my superior officers the matter of the petition for the forty hour week. This was a petition which I was requested by the men to get up and circulate, asking the company to agree to give us our forty hour week which the agreement called for. After circulating this petition a couple of days during noon hours, I was called into the office by Mr. Sasser and this petition was discussed, and I was advised to withdraw this petition, stop it, by Mr. Sasser, for my own personal benefit, and the petition which the men had signed was stopped.

I did have a meeting with Mr. Sasser in the presence (101) of the other members of our Board, the other Craft Chairmen. I think the six Chairmen were present. I have no minutes of the meeting, and I could not recall what, if anything Mr. Sasser said at that time. That was the meeting I was speaking of that Mr. Sasser asked me at that time to suppress it for my own good. I did not handle the whole situation. Mr. Sasser went around to the other six men and asked them their opinion on it and got their approval that it should be withdrawn and then asked me to withdraw it. He made the remark that it was for my own personal benefit. I have had occasion to have other conferences and take grievances up with Mr. Sasser or the other officials of the road.

Along in 1933, in reference to the men desiring to organize in the Standard Labor Organization; I had a good many requests for a standard organization from the employes that I represented. They asked me if there was any chance of getting standard representation, as we had continued on in good faith for a good number of years and could not get anything; it was getting worse all the time and they thought it was time that we tried to improve the thing. I told them that if a sufficient majority of men wanted a standard organization they could have it. And so, a petition was circulated for their approval, and we had sufficient majority of the names on (102) it requesting the Railway Employes Department to send a man over to line the boys up. The men in the shop circulated that petition. They did not Circulate it during working hours, but during noon hours and at evening. There was a meeting called when a representative arrived. There were notices printed. The shops were not working at that time. This was on pay day.

They asked me to get permission from Mr. Sasser or Mr. Tender to post one of those notices of the meeting in the wash room at the pay window so the men would know the representative had arrived and that the meeting would be held. I called at Mr. Tender's office, Shop Superintendent, and asked him for permission, and Mr. Tender read this notice over and told me that we would have to see Mr. Sasser, which we did. I was called to Mr. Sasser's office. Mr. Sasser read the notice over and we argued on the question there, or he did, rather, until twelve o'clock, until the twelve o'clock whistle blew, and then he gave me permission to put it up, and I told him there was no use to put the notice up as the men had all come and got their pay checks and there was not any use for it to be posted now. And, during the conversation, I was accused by Mr. Sasser of double crossing the men, which I denied. They did hold this meeting and I believe, as a rough estimate, there was 250 men, maybe 300 men in the hall. It was a large hall and to my best remembrance it was attended by four or five of the of-
(103) ficials, foremen: F. S. Tender, Shop Superintendent; Mr. Hudson, Blacksmith Foreman; W. H. Foster, Back Shop Foreman, T. M. Johnson, I think probably from the Machine Shop, Machine Shop Foreman; and it appears to me that Mr. George Halstead, Superintendent of the Car Department was there. The meeting was addressed by Mr. Cathey, who was merely a citizen of Princeton and the meeting was presided over by Charles Frazier. No one else addressed the meeting, except Mr. Frazier. There was a considerable number of applications taken that night for membership in the respective standard labor organizations. The result of the meeting was that there was a local for the six shop crafts formed.

At the time the vote was taken under the auspices of the National Mediation Board for the purpose of designating representatives, I think it was admitted that about sixty to seventy percent of all the employes in the six skilled crafts had joined the respective organizations.

At the time I was elected General Chairman of the Company Union I was not at that time a member of any one of the so-called standard Labor organizations. I joined the International Association of Machinists, or a local of that organization, in December, 1933.

I have discussed with Mr. Sasser several times my

(104) right or my affiliation so far as labor organizations are concerned. Mr. Sasser and I have talked that over several times. I cannot recall the dates, but it was sometime after the elections and the vote was taken. He asked me how the organizations were coming alone. I told Mr. Sasser I didn't know. He asked me if I was not Chairman of it. I told him I was not. And it drifted on in conversation. I cannot recall all that was said, but some particular things was that Mr. Sasser made the remark to me that I was a young man and there was much opportunities on the road for young men for advancement, and if I wanted to do the right thing he might be in a position to do something for me. He did not say anything to me about what the right thing was. My understanding of what he meant was that I should go along and oppose the American Federation of Labor Organization.

Previous to that time, when I went in to get permission to post that notice, me and Mr. Sasser discussed my record there with the Virginian. Mr. Sasser accused me of double crossing the men and trying to push them into the organization, and I told him I was not, that I was only doing what the men asked me to do. And Mr. Sasser made the remark that he had enough against my record to fire me at the present time, and I asked him to produce the record, and he sent Mr. Fred Tender after the record, and he came back and made the statement that he could not find the record, and, up to this time, (105) it has never been produced.

On the day that we received the notification or certification from the National Mediation Board, I was called into Mr. Sasser's office for some reason, I don't recall now, at least we discussed the vote and Mr. Sasser asked me if I had heard how the vote went. I told him I had not heard at the present time but I was expecting to hear most any time. And he made the remark that he had not heard either. And I think it was the next day that I received my certification from the Mediation Board. I think Mr. Sasser made the remark that he felt like the vote was going against the company. I recall a conversation I had with Mr. Sasser wherein he told me what the Federation was trying to get out of the men. I think the remarks that were made was that he did not care to deal with Jewell or the Federation, that he would rather

deal with his men independently, that all they were after was what they could get out of the men; the money, and he did not care about dealing with Jewell or the Standard Organization.

I was one of the observers at the time that the election was held to select representatives from the Mechanical Department employes. I first got notice that I was selected as one of these observers when I was called to Mr. Sasser's office by the Shop Superintendent, Mr. Tender. I went into Mr. Sasser's office and Mr. Sasser told (106) me that I had been selected as the observer to represent the Mechanical Department Association in taking the vote, to assist the Mediator in taking the vote. I was at that time General Chairman of the so-called Company Union. I was at that time a member of a local lodge of the International Association of Machinists. All of my fellow workmen were familiar with that fact. I think the Mediation Board selected me as observer. I was not in Norfolk when these negotiations were carried on. I first met the Mediator who was representing the Board of Mediation in Mr. Sasser's office at Princeton. I never did meet him prior to the taking of the election.

The first question raised as to my qualification to act as such observer was when we were taking the vote at Princeton. The protest against me in assisting taking the vote was from the Chairman of the Car Department, H. C. Hearne, of the Carmen's Organization of the Mechanical Department Association. To my best remembrance he filed a protest to me, to the Mediator through me. I accepted it and the Mediator taken it, in writing. I afterwards had handed to me the authority to act from the General Chairmen of the other crafts. There were six crafts in what you call the so-called Company Union and each of the six crafts had a chairman. This paper Marked Exhibit 19, is authorizing me to represent the Mechanical Department Association as an observer in (107) the taking of election, from the Chairman of the Car Men on this division here, from G. R. Franklin of Roanoke. He is Car Men Chairman, Chairman of the Car Department on this division.

"August 17, 1934.

"Mr. J. W. Munsey, Chairman
Mechanical Department Association,
Princeton, West Virginia.

"Dear Sir:

"In the designation of a representative to assist the Mediator now on this railroad for the purpose of taking a vote on the question of representation of the Shop Craft Employes, it is my desire that my craft be represented by J. W. Munsey." (Signed) "G. R. Franklin, Chairman, Car Men."

This paper marked Exhibit 20, is another authorization authorizing me to represent the Boilermakers in taking the vote and assisting in taking the vote, from Andy Duncan, Chairman of the Boilermakers.

This paper marked Exhibit 21 is authorizing me to assist the Mediator in taking the vote, from R. S. Hiekok, Chairman Electrical Workers.

This paper marked Exhibit 22 is authorizing myself to represent my craft in assisting the Mediator in taking the vote. I signed this as General Chairman.

These authorizations were executed and delivered to me after the protest had been made. I understood my duties as an observer at those elections were to see that (108) the men were voted, or to assist the Mediator in taking the vote. I was merely a silent observer to see that it was a fair and impartial election. I sat with the Mediator at every point where the election was held on this railroad. I heard the statement of Mr. Sasser this morning, enumerating the various points as to arrangements that had been made for the holding of elections. His statement was approximately correct. In the actual holding of the elections and the receiving of the ballots, I can say to the Court that that was a secret ballot on the part of each individual. The arrangements were such that no one other than himself would know how he voted. After each individual voter marked the

ballot, he brought it to the Mediator, folded up, and the Mediator deposited it in the ballot box. The Mediator validated the ballots before they were handed to the voter by initialing them. All three of us put our initials on the ballot. No other ballots were counted than those that carried the initials of us three men. It was a fair election. When the ballots were all received, at Princeton which was the first place we voted, they were sent to the Mediation Board, I understand. The Mediator sent them in. They were first mailed to Norfolk to the Post Master. I was present and participated when the vote was counted in the hotel in Norfolk. At the time we met in Norfolk to count the votes we then had the ballots from all the points where balloting had been carried on.

If there was an absent employe or one employe at a (109) point where we were not taking an election because there were too few men, the ballot was mailed to the party.

We first started taking ballots or holding elections in Princeton, the first time about August 16th, I believe it was, the 16th or 17th, somewhere along there. Up until that time there had not been any agreement entered into between the parties to this dispute, the Company Union and the System Federation No. 40. The election started on a notice posted by the Mediator. When we started in that morning of the 16th or 17th to take the ballot, we voted until the afternoon sometime and there were several protests against the election, the way it was being conducted, and the interference that was going on around the voting place, and the Mediator submitted it to his Board and the election was declared void. The interference complained of was that there were several office employes around in the various places, around the voting precinct, and the voting precinct was visited a number of times during the voting of the men by Mr. Sasser. There was a report that there was various rumors being circulated out in the shop that if the men did vote it was an indication that they knew they were against the company and if they did not vote they knew they were for the company. The result that had on the number of (110) votes that were cast during the day or forenoon or part of the afternoon at Princeton was the men were afraid to go and vote on that account. They felt like

they were more or less being put on the spot. The Mediator sent me out there to find out what was happening. I went through the Car Department. I talked to Foreman Overstreet. It was raining that day very hard. I approached a bunch of men in the shelter down there and told them that the time for the Car Department to vote had arrived, and if they wanted to vote we were waiting for them, and the remark that the Foreman made was that these men are not voting. At that time the provision of the rule under which the election was being held provided that it would be decided by a majority of the eligible vote.

To my knowledge that report of the troubles we were in on the first day, was carried to the National Board. The result of it was that the Mediator was ordered to take a new vote.

On the 18th we entered into this agreement that is filed here as an exhibit in this case, the last agreement. I signed that agreement and Mr. C. L. Bentley signed it. He was representing the Railway Employes Department, and it was witnessed by Mr. Bronson, Mediator.

On Monday morning, August 20, we started again taking a vote and it was in that election that we went to all (111) the points and took the ballots of the men. I assisted in the counting of this vote. I have seen the certification issued by the National Mediation Board. That certification correctly states the vote as it was counted in my presence. At the time the vote was counted here in Norfolk, there were present Mr. Bronson, the Mediator; Mr. C. L. Bentley, and myself; in other words, the Mediator and the two silent observers were present when the vote was counted. The vote was fairly counted. I think there were probably two or three void votes in the box. They were void and thrown out because there was one that was not voted at all and one voted in both squares. I mean by "voted in both squares", that the ballot was drawn up so that they could vote for either organization for representation, whichever they chose, and one ballot they had voted for both organizations, and the other had been folded and placed in the box unmarked. By the squares I refer to the squares made available for the men to make their choice and the ballot I referred to, the man had voted for both of them and the other ballot I referred to had nothing on it at all.

CROSS EXAMINATION

By Mr. Hall:

I entered the employment of the Virginian Railway Company July 1, 1924. That was after the strike of the (112) American Federation of Labor in 1922. I did not enter as what they call a scab.

I did not say I was never a member of the Mechanical Department Association. When you accept employment there you are considered a member of the Association. I was a member of the Association by the mere fact that I was in the employ of the company. That made me a member of the Association because the Association applied to all the six shop crafts. I mean the contract applied to all six shop crafts.

Q. But you were not forced or told by anybody that you had to become a member of that Association? A. If you worked there, you did.

Q. Do you mean you were told that if you did not join and affiliate with that Association that you could not work there? A. Not in those words.

Q. Well, in what words were you given that impression? A. I was given that impression that if I belonged to a standard organization I could not work there.

I had previously belonged to a standard organization; I carried my membership through the Grand Lodge in the International Association of Machinists of the American Federation of Labor. I had previously worked in various places in contract shops; Mullens, for one instance. Not with the Virginian but with coal Companies. I worked there for about four years. I had worked on general repair work. I had worked at various places. When I came to Princeton in the capacity of a mechanic I had served between six and eight years as a mechanic.

I was not a member of the American Federation Shop (113) Crafts Association when I came to the Virginian in 1924.

Q. Were you asked any questions when you sought employment, as to whether or not you were a member of the American Federation of Labor? A. I was required to sign some kind of a card when I was hired. I don't

recall just what was on the card. That was when I went in the office to sign up for the job.

Q. You do not mean to leave the Court under the impression that you signed a card making the declaration that you were not a member of the American Federation of Labor? A. I think that was the contents of it, yes.

Q. Where is such a card? A. It is in the possession of the Virginian Railroad Company, I suppose, at Princeton.

Q. So, I understand you to say now that you signed a card which is in the possession of the Virginian Railway Company in which you made the declaration that you were not a member of the American Federation of Labor? A. I don't know whether it was that direct, or not. It was to that effect, meaning the same thing.

I say I never attended any meetings of this Shop Craft Association only when they elected officers and Mr. Sasser sometimes, and some of the officials made a talk of some kind in the shop during noon hour. If you call that a meeting, that is the only meetings we ever had. Our officers were elected by a vote, pretty much secret ballot. The elections were held every two years. I voted in all those elections after I became an employe of the Virginian. And when I was elected Chairman of my craft, I was elected by a secret ballot conducted in October, 1933. And then I was elected General Chairman by the Chairmen of the several crafts.

In October, 1933, when I was so elected as Chairman (114) of my craft and as General Chairman I was not affiliated with the American Federation of Labor. I had not made any effort to organize lodges of the American Federation of Labor at that time. My activity in that respect began after there was a majority of the men in the organization. I went in with them. I signed up with the Standard Organization. That was in December, 1933. In December, 1933 I joined the local lodge that was organized by the American Federation of Labor.

I did not say I had petitions and requests of the men to organize lodges of the Standard Organizations. I said I had requests and a petition signed by the men for the International Association of Machinists to send a representative over to organize them. I suppose that petition is in the possession of the International Association of

Machinists in Washington. It was delivered to me by the men of the Shop Crafts Association. That petition was circulated by a good number of men. I could not recall who they were. I can name some of them probably. J. M. Wallace and Andy Duncan. I think that is about all I can recall of the names. It was passed from craft to craft through the difference departments I mean that the petitions were signed by the members of these different crafts and also their Chairman of the different crafts. I mailed those petitions in, as I was requested to.

The next step in connection with the organization was (115) that a Mr. Frazier arrived, and there was a meeting called. The men gave me notice of the meeting and asked me to get permission from Mr. Sasser to post the notice in the wash room at Princeton. That meeting occurred sometime in November of 1933. I did not post the notice. If I am not badly mistaken, it was left in Mr. Sasser's office. I believe I told Mr. Sasser, or Mr. Tender, one, to throw it into the waste basket after I was delayed in posting it until the men had all come and got their pay checks and gone home, and Mr. Sasser told the shop superintendent, Mr. Tender, to go ahead and post it, and I told him it was no use, to throw it in the waste basket, and, as far as I know, it went into the waste basket. I wanted to post it while the men were being paid off. There was no other place I could have posted it on a regular bulletin board where the men would have seen it because that was the only bulletin board there beside the pay window that the men would all have seen it, because they were paid off in the wash room. Notices are usually posted on bulletin boards in this wash room and on other bulletin boards in the shop and different places. After Mr. Sasser gave me his consent to post the notice I did not post it on this bulletin board in the wash room and other bulletin boards in the shop for the simple reason that the men were all off and the shops were all shut down and there would be nobody there for two or three days or maybe a week, I don't know the date, but to my remembrance the shops were (116) shut down until the first of the month and no one would see it for they had got their checks and gone home and they would not be back any more until the first of the next month and it would not have done any good to have posted it down there at that time. It was

about six or seven hours before the meeting was scheduled that I made my request to post this notice. The meeting was held and roughly, I judge there were present probably 250 men in the hall. So, they did get notice that the meeting was going to be held. I understood they got that notice by some of the fellows posting some of them up and down on the streets and just passing the word around the best they could. Mr. Frazier, representative of the Railway Employes Department, had charge of that meeting. I suppose he is what you ordinarily call an organizer. I was present at that meeting. I did not act as secretary of it. I was merely there and that was all, to see what action the men took, if they wanted the American Federation of Labor or the Railway Employes Department to represent them, or whether they were going to continue on with the Association they had which represented them. I did not take any applications at that meeting for membership in the American Federation of Labor.

The next meeting was held probably a week or ten (117) days later and I was present at that meeting in the capacity just as a man, that was all. I did not take any part in the meeting, that is any leading part. I do not remember the date of that meeting. It was in 1933. Probably a couple of weeks after that there was another meeting held. I do not recall whether I was present at that or not: probably I was. Mr. Frazier, the organizer, conducted all of those meetings. He usually stayed in Princeton a couple or three days at a time and then would go out to other points along the road and drop back in again. I think the three meetings that I mentioned were all held in 1933. I could not mention the dates and say just how many meetings were held in 1933; probably three and maybe there was four or five. I was at all of them except probably maybe one. I did not ever make any speeches at any of those meetings. I did not take any applications for membership in the American Federation of Labor at any of those meetings. When I did take applications was after I figured that the majority of the men were lined up, the records showed that the majority of the men were in the standard organizations, and after I went into the organization I took an active part with them, helping them to form the organization and get it in a working order. I began to

take active part around the first of the year, sometime, 1934. When I was taking an active part in the organization of the Federation lodges I knew that that would (118) supercede the Mechanical Department Association of which I was General Chairman.

There was a meeting held at Victoria and I was there. There were no organizers at Victoria as I remember at the time I was there. A meeting was held. Mr. Gorman was not there. Mr. Sebold was not there. I believe that the meeting was presided over by Mr. Ben Powell who was a machinist on the Virginian Railway located either at Princeton or Elmore. I don't recall which place he was located at, at the present time. He had worked at both points. I went there with him. The object of it was to organize the men there in the American Federation of Labor. I went down to see what the men were doing, to see what they were going to do. That meeting was held in the early spring of 1934, or probably the early summer; I don't recall the month. I never solicited any men for membership. I did not take any applications for membership. I did not accept any fees for the initiation fee. There was no time paid for that trip and I paid part of my expenses and some of the men in the crowd that went down there paid part of it. I did not receive any compensation as an officer of the American Federation of Labor. I have not received any part of the initiation fees or fees paid.

Q. Who has paid your expenses in connection with (119) the different trips you have made and your activities in behalf of the American Federation of Labor? A. The only expenses that I know of that have been paid for me was paid by the men at Princeton.

Q. What men? A. The International Association Machinists members and the other five crafts at Princeton.

Q. In other words, your local crafts there have paid your expenses in connection with the organization of the American Federation of Labor? A. As far as the actual expenses were concerned, yes.

The letter you show me is in my handwriting.

Mr. Hall: I want to offer this as Defendant's Exhibit

A, reading: "Princeton, West Virginia, September 7, 1934. Mr. J. W. Sasser. This is a time sheet and expense account for the time I was assisting Mediator in taking vote on Virginian Railroad, nine days that I did not check in, amount $53.28, and expenses was $33.95, totaling $87.23. Signed J. W. Munsey, General Chairman, Mechanical Department Association."

I wrote that letter. I received a reply to it. The paper which you hand me is a copy of the reply I received:

Mr. Hall: It reads as follows, and I offer it as Defendant's Exhibit B:

"Princeton
September 12, 1934.
File 120-Elec.

"Mr. J. W. Munsey, General Chairman,
Mechanical Department Association,
Princeton, West Virginia.

Dear Sir:

"Referring to yours of September 7th covering ex-
(120) penses and time lost as General Chairman of the Mechanical Department Association, while assisting the Mediator in taking a vote on the Virginian Railway.

"The Amended Railway Labor Act makes it unlawful for a carrier to use its funds in maintaining or assisting or contributing to any labor representative or other agency of collective bargaining, and with this information we hesitate to grant your request that we pay you for the time lost and expenses in conducting this election. It would seem that the proper way to handle this would be to have the members of the Association pay these expenses.

Very truly yours,

(Signed) J. W. SASSER,
Superintendent of Motive Power."

Those expenses were actually paid by the local lodge of the Federation at Princeton. The local lodge of the American Federation of Labor actually paid my expenses and time when I was acting as an observer for the Mechanical Department Association. After I had been instructed by Mr. Sasser that the company would pay me for my time and my expenses while assisting the Mediator, and after their refusal to carry out their part of the contract, the Federation said I should not lose it and they would pay it themselves, which they did.

I said that there were two elections held, one beginning on the 16th of August and then that election was protested, and another one held on August 20th, and I (121) was acting as observer at the election held August 16th.

Q. Now, there was a contract under which that election was held, was there not, Mr. Munsey? A. The first election?

Q. Yes. A. Not by me.

Q. Your name appears to be signed to a paper that is filed here as an exhibit providing for the first election on August 16, 1934. Notice of the election prescribes the rules under which the election was to be held. one of them being that the vote will be taken and counted separately for each of the Shop Craft Organizations and each organization receiving the majority of the total votes shown on the eligible list of voters will be recognized as representatives of the employes in question.

Mr. Mulholland: His name is not on that. That is the ballot.

Mr. Hall: The ballot was a part of that contract. It is referred to as a part of it.

By Mr. Hall:

Q. Now, your name was signed to the ballot as General Chairman of the Mechanical Department Association on that first agreement. Did you sign that? A. No, sir.

I never authorized anybody to sign it for me. I did not authorize Mr. C. L. Bentley who represented the Division of Railway Employes Department of the Ameri-

can Federation of Labor, to sign my name to that paper. He never did communicate with me about attaching my name to it. I did not know that my name was signed to such a paper until after the second agreement was drawn up, the only agreement that I ever signed. If Mr. Bentley, as representative of the American Federation (122) of Labor claimed the authority to attach my name to that agreement, he did not have any such authority from me. I never heard of his claiming the authority to. The first agreement was signed by Mr. J. W. Sasser on behalf of the Virginian Railway Company. When this first election was protested and Mr. Bentley and I drew up an agreement for the second election. I don't believe Mr. Sasser signed that agreement. I am not positive. I have it here, if you will just permit me to look at it (looking at papers). No, sir. That is the agreement of August 18, 1934, and at that time I was a member of the National Federation of Labor and I had attended the meetings in organizing the American Federation of Labor on the Virginian. I had asked men to join the Federation and I had taken applications.

Q. And yet you were signing that as representing the Mechanical Department Association that had an opposing interest? A. Yes.

Mr. Hearne and probably others, I said protested against my acting for the Mechanical Department Association. Mr. Hearne was the only man that I know of who protested against my acting. He signed a written protest. Mr. Bentley protested that first election held on August 16th. He made protest to the Mediator, Mr. Bronson, claiming that the election was unfair. The Mediator did not tell him that the election was perfectly fair; he told him that there was something peculiar about it, why the men were not voting. I mean to say that the Mediator said that the election was being unfairly conducted, after he investigated and found out (123) the reports that came to him, not the election part of it, but on the part of coercing the men, keeping them from the polls. It is a fact that in the early part of the day Mr. Bentley protested that election to the Mediator and the Mediator told him that the election was being perfectly fairly conducted and that he did

not see any objection to going on with the election under the rules that had been agreed upon. If I am not mistaken Mr. Bentley protested direct to the Mediation Board. I was not present when he made his protest to the Mediation Board but he did protest either through Mr. Jewell, the International President of the organization, or directly to the Mediation Board. The Mediator did not refuse to communicate that protest on the ground that the election was unfair. He did communicate that protest in the afternoon, or the following night. He got in touch with the Mediation Board in Washington and he was instructed, after giving the information that he had, to hold a new election. That was after Mr. Bentley had protested to the Mediation Board about the interference of the election and after the Mediator had refused to communicate with the Mediation Board; and the Mediation Board, through some influence, called up the Mediator and told him to call another election.

Q. And then it was that you entered into this agreement under which the election was held, pretending to represent the local Shop Crafts Association and agreed to a change in the rule for holding an election making the majority of those voting determinative instead of a majority of the eligible voters of the craft? A. Yes, sir.

And all of that had occurred before I entered into this (124) agreement. I was acting for the Mechanical Department Association in entering into that agreement making the majority of the voters determinative instead of a majority of the eligible voters of the craft. In making that agreement I was serving the Mechanical Department Association.

I said that I circulated a petition there to put the men on a forty-hour week basis and presented that to Mr. Sasser. I also said that Mr. Sasser advised me to withdraw the petition and said that it would be to my benefit to withdraw the petition. Mr. Sasser asked me to withdraw that petition because the mere fact is he did not want it circulated because he knew that the majority of the men were demanding and wanting forty hours a week which the agreement provided for, and he knew that if the majority signed the petition that was being

circulated, it might force them, in other words, to try to comply with it, to try to satisfy the men, and as we had had a petition circulated before to that effect and it carried by a big majority at the present time accepting a reduction in hours at the present time, and in order to offset that petition we would have to circulate another one to get the majority of the men to sign it to overcome the first one which had been in existence for three, four or five or maybe six years. It is not a fact that Mr. Sasser advised me and requested me to withdraw that petition on the ground that they had ony a limited appropriation in the dull times for the shop work at Princeton and that if we put the men on forty hours per week (125) it would result in dropping a whole lot of men and give the men who had the seniority forty hours and the other men nothing. Mr. Sasser had agreed, if I would suggest it, or say so, to reduce the force time after time up there, and I told Mr. Sasser I wanted to see no one cut off, that we wanted to get as much time as we could for each man that he had and did not want to reduce the force. I do not recall that Mr. Sasser did not give me that as the reason for withdrawing the petition; I don't recall just what he said in this respect. Here is what Mr. Sasser said to me: He came into the shop and talked to me about this petition, came down to my machine. He told me that he wanted to drop it and he was trying to get more appropriation, doing all he could to get more shop appropriation, and I told Mr. Sasser, or asked him rather, if he did not think that if we would send one of these petitions in to Mr. Hix, the President of the railroad, that it might have some effect towards getting more appropriation, and the remarks Mr. Sasser made, the answer he gave me, was no, he did not want Mr. Hix to know anything about any dissatisfaction in the Princeton shops.

I do not know and I did not know at that time that if they had only a limited appropriation for these shops there at Princeton, that if the men were put on a forty-hour week basis it would result in dropping a whole lot of men who were low on the seniority list. I did know that if the appropriation should be cut small enough and the men were put *put* on a forty-hour per week (126) basis, it would result in dropping the men low on the seniority list.

At that time I was probably about forty-five on the

seniority list; about two-thirds of the way down the list.

I said that at some of those meetings that were held to organize the American Federation, certain officers or foremen of the Virginian Railway Company appeared at those meetings. I do not think any of them addressed the meetings or took any active part in them. It was not at those meetings that certain of the employes who did not sign up applications for membership in the Federation were asked to leave. They were asked to leave the meetings after the locals were formed. A fellow is not allowed to sit in a local meeting who is not a member.

I joined the American Federation in December, 1933, filed a regular application, paid my initiation fees and dues and became a regular member of the Federation from that time on.

I said when I had some conversation with Mr. Sasser previous to the holding of the election that Mr. Sasser told me that I was double crossing the men. I don't know what his reason was for making that statement to me. The only reason I know is that was the time I went into his office to get permission to post the notice, he told me that. That was in November, 1933. Mr. Sasser did not tell me that in attempting to represent the independent organization as General Chairman and being a member of the American Federation of Labor at the same (127) time would be double crossing the men because I was not representing the men in the local organization. I was not a member in the American Federation of Labor or the Railway Employes Department, or any other standard organization that you have spoken of at that time. I don't know whether that was the only time he told me that, when I first went to him about posting the notice, or not. I could not say. In response to questions by the Court, the witness stated: This time about which I spoke when I went to Mr. Sasser to get permission to post a notice was in November, 1933. I could not recall the date, it was in the latter part. The notice which I asked permission to post at that place was notice of an open meeting for the benefit of the shop employes that night to discuss this matter with this representative of the American Federation of Labor. I advised him at that time of the nature of my application.

I have filed here as Exhibits 19, 20, 21, and 22 certain requests to me, dated August 17, 1934, to act as the representative of the Mechanical Department Association as

an observer in holding this election. At the time these papers were handed me, it was generally known that I was a member of the Federation of Labor. Mr. Sasser and the other officials of the Railroad Company knew that. One of these papers is addressed to J. W. Munsey and is signed by J. W. Munsey, Chairman of the Machinists. That is I requesting myself to act as observer. One of them is signed by G. R. Franklin, Chairman of the Car Men. Mr. Franklin is in Roanoke. I don't know whether he was a member or not. I don't know whether he was active in the organization of the Federation. I (128) don't know what part Mr. Franklin played in the organization at that time. Andy Duncan, Chairman of the Boilermakers, lives at Princeton. I suppose he was a member of the Federation at that time. In my best remembrance he was. He was a member; I don't know what part he played in forming the Federation. I don't know how active, what part he played. I have stated he was a member and that is all I know. I don't know whether he went out and took applications, or not. I never seen him do any of it.

I have one signed by R. S. Hickok, Chairman of the Electricians, located at Mullens, I believe at that time. I could not say definitely whether he was or was not a member of the American Federation at that time, August 17, 1934. I don't know whether he was active in connection with the organization of the Federation.

Q. Now you say that the men knew that you were a member of the Federation and at the same time pretending to act as Chairman of the Association? A. Yes, sir.

Q. And you received protests against your acting in that dual capacity? A. One.

I do not know that it was generally discussed around the shops at Princeton and that a lot of the men refused to go there to vote because I was there as an observer and acting in a dual capacity. I suppose the officers of the Railroad Company knew that I was a member of the Federation. I do not know that Mr. Sasser knew it. He had not seen my membership card and he could not swear I was a member. I don't know whether he knew of my activities in forming the Federation. I don't know (129) what he knew. He probably told me that I was

acting in a double capacity and that I was double crossing the men that belonged to the Association. He probably said something like that. I don't recall just what the words were that Mr. Sasser used. I would not attempt to.

I said there was a protest that that first election was not being fairly held. The interference with the election, why it wasn't being fairly held, was on account of the part the company officials were playing in it. The voting precinct, I mean the voting place, was attended regularly every few minutes by Mr. Sasser that day. The Mediator asked Mr. Sasser to arrange for these men to come in groups, according to their crafts. I don't know whether he asked him to come down in the voting place where we were voting. Mr. Sasser was present in the voting place when some of the men came in there to vote. When they actually voted I believe Mr. Sasser walked over to the far side one time and probably left at some other time and walked out. I do not know as a matter of fact that the Mediator asked Mr. Sasser to be there and help him get the men in, in groups. That was not the only objection to the fairness of the election, Mr. Sasser's presence there. There was objection on account of the office clerks standing outside there watching, I suppose, that is what the men felt like, the voters coming in to vote and see who came in and voted and who did not. The office clerks outside, among them was Mr. J. C. Evans, Chief Clerk to the Shop Superintendent, and Mr. Selby from the Car Department, I think he was time-
(130) keeper down there. I did not hear any of those men say anything to the voters about voting or trying to keep them from voting. It was just the fact that they were standing around on the outside, that is all. And it was circulated down there in the Car Department that if they went to vote the company would know they were against them and if they did not go to vote the company would know that they were for the company. That is what the men came in and told who came in and voted. During the first election I went down into the Car Department myself. I never asked the men to come and vote. I went there to inform them that the voting time for the Car Department had arrived and if they wanted to vote that they could do so. Mr. Bentley, the representative of the Federation, accompanied me there. The Federation man and I were given the privilege by Mr.

Sasser of going down there and telling those men to come out and vote. I would like to correct that statement there. Mr. Bentley did not accompany me down to tell the men to come and vote. He accompanied me down there to see about the Bulletins and see if they were posted. I went down to tell the men it was voting time. I think Mr. Hearne went around with me to tell the men about that. I don't know whether Mr. Sasser authorized Mr. Bentley to go into the departments and see the men and did not place any restrictions on him. I don't know anything about that; I never heard him.

I believe it was the day that the first vote was held that the members of the Association first found out that (131) I was a member of this Election Board as observer. That was not the first thing they knew about it; there was Bulletins posted to that effect around on all the Bulletin Boards on the morning of the first election, August 16th, I believe it was. August 16th was the first time that any of them had an opportunity of protesting against me acting in that capacity. Mr. Hearne did protest against my acting; I don't know on behalf of whom. He filed a written protest to the Mediator with his name to it.

I said I signed a card when I entered the employment of the Virginian Railway Company which in effect said I was not affiliated with the Federation. That has been eleven years ago. I don't know just what was on the card, but it was something to that effect, that I would not belong to any standard organization while I remained in the company's service, or something. I don't know just the exact wording of it and could not repeat it. I don't know just what form it was, whether it was a card or a slip of paper. It was presented to me, to my knowledge, in the timekeeper's office when I went in to sign for the job. I suppose that is what they call signing up for the job when you sign that. If I did sign such a card in which I said I did not belong to any standard organization, I was willing to accept employment on those terms and did accept it on those terms. I did not have to become an employe of the Virginian Railway Company and I could have declined to accept employment on those terms. I knew that.

Re Direct Examination

I have read the provisions of the Railway Emergency
(132) Transportation Act that outlaws all such agreements.

It was in August that I first knew I was to act as an observer in this election. It was the same morning of the 16th day of August, before the voting started, that Mr. Sasser told me I had been selected. As to compensation for the service he told me as far as he knew the company would pay me for my time and expenses. The Exhibit A which has been handed to me is the statement that I handed to Mr. Sasser to cover that time and expense.

Re Cross Examination

Mr. Sasser told me that the company would pay my time and expenses acting as observer. I did say on direct examination that I was a member of the Grand Lodge of the Federation before I became employed by the Virginian. My membership was through the Grand Lodge. The only membership I ever had in the International Association of Machinists was through the Grand Lodge, up until December, 1933. My membership as a member of the Grand Lodge ceased in 1927.

E. J. Preston, a witness for the plaintiffs, testified
(133) as follows:

Examined by Mr. Mulholland:

My name is Earl Jamison Preston. I live at 805 Mercer Street, Princeton, West Virginia. I am a married man with a family. I have been employed by the Virginian Railroad Company as a Machinist for eleven years.

I don't know how I became a member of the Mechanical Association of the Virginian Railroad. So far as I know, I never did sign an application for membership. I never did pay any dues to the Association. I never did attend any meetings of the Association, or know of any meetings having been held, other than the biennial meet-

ing for the nomination of officers. Those biennial meetings of the Association were held in the shops. I did hold office in the Association; I was elected some way as a member of the Association Board and I received my notice through company mail. I think my appointment to that position was by selection of the other members of the Board. I am the Preston who was the President or General Chairman of the System Federation No. 40. I am one of the plaintiffs in this case. System 40 is an organization of Mechanical Craft organizations on the Virginian Railroad. The officers of System No. 40 consist of an Executive Board of six General Chairmen, one for each craft. They are myself as General Chairman of the Machinists; Andy Duncan as General Chairman of the Boilermakers; William Sarver as General Chairman of the Sheet Metal Workers; W. S. Penturff as General Chairman of the Blacksmiths; and A. (134) P. Wyatt as General Chairman of the Electrical Workers. The Secretary-Treasurer is Ernest R. Belcher. P. L. Allen is General Chairman of the Carpenters, excuse me. The men I have named are the plaintiffs in this case, in addition to the System Federation.

I am the Mr. Preston who signed the letter which has been introduced in the record from the System Federation Chairman to Mr. Bucholtz, asking for a meeting following the issuance of the certification by the National Mediation Board. I did attend here in Norfolk at the time Mr. Gorman was endeavoring to contact Mr. Bucholtz President of Virginian Railroad. I was here at that time from the 14th until the 21st, inclusive.

The letter which has been introduced in the record here as Exhibit No. 15 from Mr. Bucholtz to me, dated November 19, 1934, was delivered to me in Mr. Baker's office or by, I imagine, his secretary. I was at that time in the office endeavoring to get a conference with Mr. Bucholtz. He did not receive me on that date but his assistant handed me this letter. I have never at any time met with the President of the Virginian Railroad since this certification was issued by the Board of Mediation. The efforts I have made to try to make that contact were just about like Mr. Gorman stated on the stand here. I was with Mr. Gorman and made the contacts that he made. I was in his presence all the time that he was endeavoring to make contacts in Mr. Bucholtz's office, or at his office, and that was in November, the 14th,

on a Friday, until the 20th. The 19th, I believe was the (135) last day we contacted the office. December 27th Mr. Bucholtz had notified us that we were to meet at Mr. Sasser's office in Princeton. Mr. Belcher, System Federation Secretary-Treasurer, and myself, and Mr. Gorman were at that conference there. That is about all the contact we had an opportunity to make.

None of the committees of the System Federation as now set up on the Virginian Railroad has been recognized by the management. As to the management continuing to deal with the Association Committees and the representatives since the election, I know that Mr. Bushey, one of the officers of the so-called Company Union has made contact with the officers of the company in securing more time; that was their statement. System Federation has set up the necessary committees for contacting with the company. So far as I know none of those committees has been called in by any of the management. So far as I know the management has not done anything whatsoever to comply with the mandate of the certification issued by the National Mediation Board. I am the chief officer of the System Federation No. 40 and that is the organization that was designated by the National Mediation Board to represent the Mechanical Employes.

I know Mr. J. W. Sasser. I was working for the Virginian Railroad Company in 1927. At that time Mr. Sasser told me that I could not carry a Union card and work on that railroad. After he told me that I offered him my card and asked him if he would keep it stamped (136) up until I left there, and he refused to take it. I withdrew from the organization at that time and from that time on I was not a member of a standard union until this new organization started. At the time Mr. Sasser told me I would have to give up that card or get off the railroad I belonged to the International Association of Machinists. I again became affiliated with that organization December 14, 1933, which was at the time that there was a general entry into the standard organization. I have heard the testimony of Mr. Munsey in reference to the general organizing that was going on during that period of time. I would substantiate what he said if asked the questions in reference to it, as far as I know.

CROSS EXAMINATION

By Mr. Donnally:

The circumstances attendant upon my becoming a member of System Federation No. 40, the local Federation, in December, 1933, was just a general movement of the men at that point. I put in an application at an open meeting. Mr. Munsey was not acting as Secretary of that open meeting. I could not swear whether he was present at that open meeting or not. Mr. Munsey did not ask me to become a member of the Federation.

It was in 1927 when Mr. Sasser stated that I could not become an employe of the Virginian if I held an American Federation of Labor card. That was not when I (137) came to work with the Virginian; Mr. Sasser had already posted a Bulletin on the Bulletin Board of a reduction of force of fifty-three men because we were organizing. I was one of them. I went into his office of my own accord to submit the names of several men that I knew that were not responsible for being members as much as I was responsible for them, because I had accepted their application. I went in there to tell Mr. Sasser that. Mr. Markham was present and there was some conversation there to some extent and Mr. Sasser asked if I knew that I could not keep a card and work on that railroad. I said no, I did not. Well, I reached in my pocket and pulled my card out and gave it to Mr. Sasser and asked him to keep it stamped up until I left there, and he refused it. I have stated the general character of the Bulletin that I said was posted on the Bulletin Board, just as I remember it. The effect of it was that there would be a reduction of fifty-three men because of the organization; that was the opinion of ninety percent of the men in the shop. The effect of the Bulletin was to reduce the force because of organization being established. I cannot recollect that the Bulletin said that in words; I cannot recollect just what words were on the Bulletin. I cannot remember whether the Bulletin said why there was going to be a reduction in force on the Virginian. I don't remember anything on the Bulletin as the reason for reduction in force. That was the general opinion among the men and my construction of the purpose of the Bulletin, that that reduc-

(138) tion in force was on account of organization among the men.

On the occasion when Mr. Gorman and myself and the others tried to see Mr. Bucholtz I was in the office including the 14th to the 20th or 21st; I believe the 21st I was still there. Before I came here I was not told by Mr. Bucholtz that he would not be able to see me at the time of my intended visit; I had no correspondence with Mr. Bucholtz. Mr. Bucholtz corresponded with our Secretary-Treasurer. The communication was shown me, and that communication said Mr. Bucholtz would be unable to see me at that time. I came, nevertheless. I don't believe the letter gave any specific reason why Mr. Bucholtz would not be able to see us during the time of our intended visit. I don't believe he stated in that letter exactly why he would not be in Norfolk. We were told that Mr. Bucholtz was in Norfolk during the time of our visit there. Our visit included the days of Wednesday, Thursday, Friday, Saturday, Sunday and Monday. I believe it is a fact that Mr. Bucholtz was here only during Saturday, Sunday, and Monday. The letter from him to which I referred was delivered on Monday.

There was an effort made during the year 1926-1927 to organize the employes on the Virginian Railway into a local lodge of the American Federation of Labor. I participated in that effort. I was not a member of the American Federation of Labor until the movement started. I secured a card at the time that the movement started with the rest of the men that became members (139) then. It was in 1927 that I offered to surrender my card to Mr. Sasser. That offer of surrender was after this attempted organization that I spoke of.

Thomas Nelson, a witness for the plaintiffs, testified as follows:

Examined by Mr. Mulholland:

My name is Thomas Nelson. I reside at Victoria. I am employed by the Virginian Railway. I am a little deaf. I have been working for the Virginian Railroad Company between eleven and twelve years. I think I went there in March, 1924. I am now car man helper. I worked a few days at the car man's rate. I am working now at helper's rate.

I know Mr. B. E. Nevins, Master Mechanic in the shops in Victoria for the Virginian Railroad. I had a conversation with him in the presence of my son-in-law the night before the election was held by the National Mediation Board to settle the question of representation. Mr. Nevins came over to my house and the question was brought up about the election to be held the next day, and he told me that if this road went into the American Federation of Labor that Victoria would be nothing more than a cornfield. He also said that they had been talking about cutting out Victoria for a long time and it was on account of the loyal men at Victoria that Mr. Hix allowed it to remain as it was. He said I would not be working for the company in thirty days if (140) it went into the American Federation of Labor. He said he just felt like telling us these things if he had to go to Atlanta prison, or something like that, for it. Just exactly the words I don't recall. I have seen a paper very near like this Exhibit 18 if it was not like it. That is an affidavit as to how I voted in the election. I signed a paper something like that and swore to it. I signed every paper that was presented to me. I don't know who asked me to sign this particular paper. I was asked through Mr. Nevins' office to sign a paper since the election. Mr. Marshall, Mr. Nevins' Chief Clerk, came up on the shop track for me. He did not find me, did not know exactly where I was, and somebody else had notified me, I don't recall who it was. I met him when I was going back and he asked me about it and I told him I had gone in the office and I signed. I did not sign it in Mr. Nevins' office; it was in the adjoining room where some of the clerks work all the time. I swore to it.

Coming back to this conversation with Mr. Nevins that he had with me when he came to my home that night he blew his horn and as well as I remember I went out to his automobile. I saw him and went out.

Q. Are you willing to tell the Court what, if any effect that conversation had on your exercising your right to vote the next day? You do not have to, but are you willing to? A. I hate right bad to do it.

By the Court:

Q. Go ahead and tell it. A. Well, I just did not vote for the Federation of Labor.

By Mr. Mulholland:

Q. Why did you vote for the Association? A. I
(141) wanted to work.

Cross Examination

By Mr. Donnally:

Mr. Nevins never asked me to sign any such paper as that affidavit we have been referring to. I signed one for Mr. Billmyer, but what that paper was I don't know. I would not say that the paper I signed for Mr. Billmyer was not a paper similar to the affidavit we have been talking about. Mr. Marshall is not a notary. Mr. Waddell is. Mr. Marshall is a clerk in the office there. Mr. Billmyer was not present in the room when I signed that paper in the office adjoining Mr. Nevins' office. I do not remember what the paper was that Mr. Marshall asked me to sign. I said, awhile ago, that I did not see Mr. Marshall. Some one else told me that he wanted to see me at the office and I went while he was out on the shop track where I was working. I did not sign a paper that Mr. Marshall asked me to sign, did not sign any paper for Mr. Marshall. Mr. Marshall asked me had I been to the office and I told him I had and signed the paper. When I went there Mr. Billmyer did not present a paper for me to sign. Mr. Waddell told me to read that and if I felt like it to sign it. I don't know who left the affidavit with Mr. Waddell for me to sign. I don't know whether Mr. Marshall knew anything about the contents of that paper which Mr. Waddell asked me to sign. Mr. Waddell, acting in his capacity as notary, said he would take my signature or authentication of the paper. The paper was presented me there in the
(142) Clerk's office.

I live in Victoria. It is the practice in the company office there, in Mr. Nevins' office, for the clerks and the notary to attend to any business matters that they are requested to attend to by company employes. I have not been there and asked Mr. Marshall or Mr. Waddell to attend to matters for me. I have never been called to the office on any grievance whatever. I have not taken papers there to Mr. Marshall to have typed for me. I have not asked Mr. Waddell to act as notary for me. I cannot say that I know it is the general practice of the

company and clerks to do small matters of this sort for other employes of the company, because I have never seen it done. I have not heard other employes of the company say they had a paper typed there and had an affidavit or acknowledgment taken there. At that time I was box packer and I worked off kind of separate from the other men. I was not in the group with them.

How I happened to go to the office on the occasion to which I referred, some one told me that I was wanted at the office, but I don't remember who it was. It was not Mr. Marshall that told me. The person that told me said that Mr. Marshall wanted me, was up there looking for me, and I thought that Mr. Marshall was at the office so I hastened on to the office to see what he wanted, and passed him on the way when I came back. It was not Mr. Nevins or Mr. Billmyer who told me that some one wanted to see me at the office. I don't remember who it (143) was.

RE-DIRECT EXAMINATION

I cannot tell the court how I ever became a member of the Mechanical Department Association. I don't know that I ever signed any application for membership. I never paid any dues. I never had a grievance and do not know of a grievance being handled for any of the boys I know through their instrumentality for collective bargaining. I know they elect the officers of the Mechanical Department Association every two years. I have voted in those elections. So far as I know there was never any other meeting of the Mechanical Department Association, than the day they nominated their officers every two years.

RE-CROSS EXAMINATION

I am not a member of the American Federation of Labor now. I never held any office in the old Mechanical Department Association. So far as I know the ballots for the election of officers in the old Mechanical Department Association, the election held every two years, were secret ballots. I did not care whether they saw mine or not; I just as soon vote before the world. I never observed any attempt on the part of the railway management or its agents or employes to influence the election.

No one on the part of the railway management or its agents or employes has ever tried to make any attempt to me or any one else that I know of to influence the policies of the old Mechanical Department Association; except Mr. Nevins' visit to my house that night.

William M. Sarver, a witness for the plaintiffs, testi-
(144) fied as follows:

Examined by Mr. Mulholland:

My name is William M. Sarver. I reside at Princeton. I am a married man. I am an employe of the Virginian Railway Company. I have been working for that company twelve years the last time. The total period of my employment with them is about seventeen years. I first came to work for them in 1918. Following the so-called 1922 strike, I came back there to work September, 1923. I could not say positively that at that time there was there a so-called Company Union or Association in existence.

Possibly a month or two after I went back to work it runs in my mind that I signed a card of some description. I could not recall the reading of the card. All the boys were signing it at the shop. I signed it in the office during working hours. I could not say just who called me. Other men were going in and signing cards at the same time. I don't know what I signed. I cannot tell the court anything else that might have made me a member of this Association, outside of holding office in it. I never did pay any dues. I was first elected to office in the Association about 1928 or 1929. I was elected as Chairman of the Sheet Metal Workers. I served two years as General Chairman and one year as Division Chairman, that is two years of each. At the time I was at the head of this organization I cannot recall any meetings of the membership of the Association
(145) being held other than to get the men together to appoint the officers to succeed me. I arranged for the election at that time because I was going out of office. I made the arrangement with the men in the shop. The way my successor in office was elected was I appointed a man and notified the outlying points and they appointed a man and they were put on the ballots. The ballots

were printed in the office as far as I know. I never saw the ballots until they came out for election. I was the head of that organization. I did not arrange for printing any ballots. I did not pay any bills for printing ballots. The letfers that we sent out in reference to those elections, the company sent them out so far as I know. They went through the company mail. What I had to do with it was Mr. Calloway and I dictated a letter and he had the copies written and I signed the letter. Mr. Calloway is Mr. Sasser's Chief Clerk. I was again elected to office in this Association, in 1930 or about 1930. I was elected the last time as Division Chairman. That was 1931, I believe, or thereabouts. I never resigned from the Association. I was never expelled. Nothing more than my time expired as Chairman. I mean that if I was ever a member of the Association nothing that I know ever happened to destroy that membership.

I am a member of the Sheet Metal Workers Local Union of the American Federation of Labor. I joined them along in December, 1933. That was the time that a great many men joined the organizations. At that time there was a considerable majority of the Sheet (146) Metal Workers in this shop that joined the organization; I should say about seventy to seventy-five percent of them. Those men were in the Company Union. As I told you before, the only recollection I can have of how I became a member of this Company Union was signing this card. I don't know what the card was; I cannot recall just the reading of it, but the understanding of it was that you were a member of the Association.

CROSS EXAMINATION

By Mr. Hall:

I was working for the Virginian prior to the strike in 1922. I went out on that strike July 1, 1922. I came back to work in September, 1923. I was working at Bluefield and just went down to see if I could get a job. I think some of the boys went down there that I had worked with, and they sent for me to come in.

It is my recollection that shortly after I went back in 1923, I signed a card to join the Association, and I continued a member of that Association during all the time I worked for the Virginian up to 1933. They held elec-

tions for the general officers every two years. The last time I was in there they elected the division or assistant local officers every year. They had just started that the last year I was there. They were not elected by secret ballot. This System Board was elected every year. They were elected by the general men. I mean the gen-
(147) eral committees of both divisions. Every year they would elect new local officers, new parties. The only year they did not was the last year I was in. I was in there four years. The first office I held in the Association was System Chairman of the Sheet Metal Workers and Secretary and Treasurer of the Board. I could not tell you how many Sheet Metal Workers we had at Princeton. I think there is around twenty-three or twenty-four now; maybe more. In my capacity as Assistant Chairman I acted for my Craft. I have had grievances or questions of that kind that were taken up and if they were not settled between our officers and the officers of the Company, we had a System Board that we could appeal to. And that was continued in effect all the time.

Q. And all these men knew that they could handle any question of grievance, rates of pay, or working conditions, through that organization, didn't they? A. Yes, they would try to handle it. Sometimes they would get success and sometimes they could not.

When we did not have success I think some one or two cases were appealed, but I could not recall many of them. I do not think we had any up there that was appealed. I said I was also acting as General Chairman of my craft. That was the first two years in this craft. The General Chairman of the different crafts met and organized and elected the members of the System Board every two years; I told you before that the first two years I was in there they did not. The last term they did. There was one question, a question that has arisen so much over the time, in connection with our craft that was not han-
(148) dled or adjusted through the machinery provided for in the by-laws and constitution of the Association. That was the time of working; the company did not give them as much work as they wanted to have to do during the hard times. The company's position was that they had a limited appropriation and had to cut down the

number of hours of work each month, and naturally the men wanted to put in more time. The company would always tell the men that it did not have the money to have all of them putting in more time, that the appropriation would not pay for it; but that would not satisfy the men. I could not say that if we put in forty hours a week it would result in dropping a lot of the men who belonged to my craft and giving the work to the older men with higher seniority. I was informed that, but that is what he would tell us.

RE-DIRECT EXAMINATION

I was Secretary-Treasurer of the System at one time. I do not now hold that position. My term expired in 1930 or 1931. I held that position two or three years, possibly three years. As Secretary of the System I kept minutes of the meetings held of the System Board. There were no general membership meetings held where the members had a chance to say something. As Treasurer I did not handle any money; did not have any. There never was a cent in the treasury during the time I was the Treasurer, that I saw. The Virginian Railroad paid the bills. I could not say what was the purpose of hav-
(149) ing a Secretary and Treasurer. I could not say that it was to make it look like an organization. During all the time that I occupied the position of Secretary-Treasurer nobody ever paid me a cent for the conducting of this organization, I mean money belonging to the Association, that I can recall.

RE-CROSS EXAMINATION

I was Secretary-Treasurer two years or possibly three; 1929 and 1930, and maybe 1931. When I joined the Federation in 1933 Mr. A. P. Smoot took my application for membership.

W. M. Sarver, a witness for the plaintiffs, being recall-
(150) ed for further cross-examination, testified as follows:

By Mr. Hall:

I testified on yesterday that I was Secretary and Treas-

urer of the Mechanical Department Association for two or three years; I did not say which one, I don't remember. It was 1929, 1930, and possibly 1931, I don't remember. There were no dues or fees of any kind paid by the members that I remember. I was not so very much familiar with the constitution and by-laws of the Association. The copy which you hand me says dues and assessments may be made against the members when needed, not to exceed $2.50 per year. I don't remember reading that provision of the constitution. It does provide that there shall be no initiation fee and that the System Board may order an assessment not to exceed $2.50 per annum whenever in their opinion it is necessary. I don't know whether, with that provision, I had the authority to raise any funds that were necessary for the purposes of the Association. The Constitution says the System Board can raise them but, you see, I was just one member of the Board. We did not have any paid officers; we did not have any paid attorneys; we did not have any paid organizers; and when the men attended those various meetings they had free transportation on the railroad.

Re-Direct Examination

By Mr. Mulholland:

Q. And did the Railway Company pay their hotel (151) bills? A. Yes, sir.

Q. And meals? A. Yes, sir, paid our expenses.

Q. Now, calling your attention to the constitution that has been handed you I will ask you if it does not actually read: "There shall be no initiation fee or monthly or annual dues"?

By Mr. Mulholland:

Q. It reads "There shall be no initiation fee or monthly or annual dues"?

By Mr. Mulholland:

Q. Then it follows that "The System Board may order an assessment not to exceed $2.50 per annum whenever in their opinion it is necessary". Is that correct? A. Yes, sir.

S. F. Mazingo, a witness for the plaintiff, testified as follows:

Examined by Mr. Mulholland:

My name is Samuel F. Mazingo. I reside at Itmann, West Virginia. I am a married man with six children. I am employed by the Virginian Railway Company. I have worked for that company around twelve or thirteen years. That has not been continuous employment; I was cut off once for two years, but I was carried on the roster as eligible to re-employment.

A few days before the election for the selection of representatives on this railroad, held by the National Mediation Board. I had a conversation with a man by the name of E. M. Forbes, who is General Foreman on the car yard and the transportation yard. I came on the job one night. I work on the eleven o'clock shift, going on at eleven o'clock and coming off at seven in the morning. I found on the Bulletin Board the notice of elections that were to be held between the Federation (152) of Labor and the Association. I looked the Bulletin over and the next morning Mr. Forbes came in to explain the Bulletin and said, "Now, here, boys, is a Bulletin. You can either vote for the Federation of Labor or the Association." And then one of the men said to him, "Well, if we stay at home that will show that we are for the company, will it not?" He said, "Yes, if you want to take it that way." And he also stated there in his talk that it was not necessary for us to come out and vote, that we did not have to vote unless we wanted to, that it was not compulsory that we should come. At that time, as good as I remember, there were eight men on the seven to three o'clock shift and I believe there were eight on the eleven to seven o'clock shift, making sixteen men.

Shortly after the result of the vote was known I had a conversation with this same man Forbes. The circumstances of that conversation were I went over on the shop track just a while after the election occurred, and while on the shop track Mr. Forbes happened around and he had in his hand a paper and this paper stated on it, as good as I can remember—I cannot remember the words just exactly—but it was saying that we were

dissatisfied to have the Federation of Labor representing us, and he asked us to sign this paper, which I signed. While I was there there was one other that signed it that I remember. Three, I remember of, besides it was one man that told him he could not write and asked Mr. Forbes to sign it for him, so Mr. Forbes sat down on the rail and taken a pencil and signed it for the man. (153) The substance of the paper was to the effect that we did not want to be represented by the Federation. That was a few days after the election. I did not see what Mr. Forbes did with that petition but that night I came on at 11 o'clock and found the petition in the time book in which we keep our time. There were several names on it. I don't believe I noticed Mr. Forbes doing anything with this paper the following day. I don't believe I saw him with that petition at any other day following the day that I signed it.

I had seen one of these papers which you show me marked Exhibit No. 23, which purports to be an application for membership in the Independent Shop Crafts Association of the Virginian Railway.

Mr. Mulholland: We offer as Exhibit No. 23 a printed form of application for membership in the Independent Shop Crafts Association of Virginian Railway Company.

I signed one. I disremember the date, but it was a while after the election happened and I was on the job and one of the men walked up to me and was speaking to me about the elections. He said he thought maybe it would be best for us to sign up with the Independent Organizations because the company was not going to recognize the Federation of Labor and it would be best for our own interests to sign this paper and so, considering everything, and considering that I wanted to work and had a large family I signed and I wanted to do the right thing, and I had my views the other way but I thought best maybe for the company I had better sign the pa- (154) per, so I went ahead and signed one of the papers the following night. I am not sure just who the gentleman was who presented to me this application. It has been quite a while back and I cannot remember. He was a working man, on the job, working. I do not know

to what extent this application was circulated through the shops and yards during working hours. I never saw but one or two of them that were circulated in that way. They would take the men off to one side and give those papers to them and would not let us know anything about it.

I did vote in the election. At the time of the election I was not a member of any one of the so-called Standard Crafts affiliated with the Federation. I am not a member now. So far as I know I am carried on the roster as a member of the Independent Shop Crafts Association. I never have paid any dues except in the Independent Shop Crafts. I have paid dues in the Independent Shop Crafts; that is the one that was reorganized.

The old Association was the Mechanical Department Association of the Virginian Railway. That organization was on this railroad when I went to work there. I don't remember how I ever became a member of it. I never did pay any dues. I don't remember ever attending any meetings other than their bi-ennial meetings to select officers. I did not in any way during the years I was there contact this Association where I recognized that I was a member of the Association. Since the election another organization has been formed and that is the organization known as the Independent Shop Crafts (155) Association of the Virginian Railway Company. I joined that organization by this application, Exhibit 23; they passed me a pamphlet, one of the men working passed me a pamphlet. I don't remember his name. To some extent that organization has a constitution. I have attended some of their meetings. They held their meetings for awhile in the old company store building at Meadpoky, South Mullens, West Virginia. As good as I remember I believe I have attended two meetings. I don't remember seeing any officers or supervisors of the railroad company there. I signed this application for membership in the Independent Shop Crafts Association which you have identified as Exhibit No. 23 two or three months after the election. I don't know whether it was during the time that the officers of System No. 40 were endeavoring to contact Mr. Bucholtz. You see, I was not in contact with the Federation, therefore, I would not know anything.

Cross Examination

By Mr. Hall:

Mr. Forbes is the General Car Foreman and the conversation I have referred to was over on the transportation yard and occurred just before the first election. There was a Bulletin posted over there showing that the election was to be held, and the rules under which it was to be held, and Mr. Forbes was explaining that Bulletin to the men. The men did not ask him to explain it to them. I said one of the men asked him whether (156) they had to go and vote or not, and they did not ask him what would be the effect of not voting. When he was asked whether a man had to vote or not, he did not refer them to that provision of rules governing the election which said that a majority of the eligible voters should determine the result of the election. He did tell them that if they did not want to go it would not be compulsive for them to go. I believe Mr. Fowler did say to him, "If we don't go to the polls that will show that we are for the company, will it not?" And he said, "If you want to take it that way." He did not say that would show you were for the Company Union but I taken that for what he meant. I imagine Mr. Fowler was one of the workmen who belonged to the Company Union as much as I was. I saw Mr. Forbes circulating this paper or petition, it could not have been over a month after the election. I could not say that any of the men that he was talking to had joined the American Federation of Labor before that. I was not affiliated with the American Federation of Labor. I never attended any of their meetings. The substance of that paper was that they did not want to affiliate with the American Federation of Labor. I cannot remember just what the paper said.

I saw Exhibit No. 23, an application for membership in the Independent Shop Crafts, circulated in the shops; I saw it come out and one or two men just passed it. One of the men on the job was doing that. I just don't remember their names. It was not any foreman of the company or anybody that had anything to do with the company, only just one of the workmen. I don't know whether there was an active campaign on the part of

(157) both sides around there. I don't know whether it was on the part of the Federation or the other because I was not interested. I don't know whether the men were circulating petitions and applications for memberships on both sides. The only papers that I saw circulated was that one I told you on the shop track by Mr. Forbes. I don't remember of any one, only that Independent Shop Crafts paper besides the one that was circulated by Mr. Forbes. I am not prepared to say that there was an active campaign going on in my department between these two sides. I could not say the men were divided up. I was at Elmore and Mr. Hearne was at Princeton. I live at Itmann.

I believe two meetings is all I attended of the new association. Those meetings were held at Meadpoky, West Virginia. That is just a nickname for South Mullens. I don't remember of any officers or people connected with the railroad at those meetings. It was just the men there. I have paid dues to the Independent Shop Crafts. I am back in my dues in the Independent Shop Crafts at the present time. I don't remember if I have been expelled; I have not been called on the carpet, if I have.

I don't remember of ever having attended any meetings of the old Mechanical Department Association, only just in the doghouse there in which we sent off to elect our officers and members every two years. I voted in every one of those elections that I had the privilege and was around. You see, it was not compulsory for us to vote unless we wanted to, but I did vote and take part in those elections. We selected the men that we wanted (158) to represent us. No one interfered with our vote. It was a secret ballot. So far as our voting was concerned we did not have the privilege to have a man represent us at Elmore in the Car Department. It seemed like we were small in number at Elmore and the majority seemed to overrule us in Princeton. In other words, the Princeton people could elect a man in our department against our votes.

RE-DIRECT EXAMINATION

I said I voted in the election between the Association and the Federation. It was a fair vote. I taken my ballot

from the Mediator, went into the booth, marked it. No one saw it. I folded it first in the booth, brought it back and handed it to the Mediator and he placed it in the box in my presence. As to what the so-called silent observers were doing when I voted, the Mediator sat here, then there was a man sitting over there, and then there was one sat across the table from the Mediator. I was not acquainted with either one of them. Those men had lists from which they checked the names as they voted. Each one checked when I got my ballot. Neither one of those so-called observers said anything to me at all. As far as I know, it was a perfectly fair election. We did not have more than one election as between the Federation and the Association at Elmore. They put off our election at Elmore. I understood there was some kind of mix-up at Princeton was the reason. That is what I referred to as the first and second election.

Re-Cross Examination

There were two notices of election posted at Elmore. (159) The first one which I was talking about awhile ago was posted. Then there was a bulletin or piece of paper posted telling us that the election would be put off. I don't remember of any other.

Andy Duncan, a witness for the plaintiffs, testified as follows:

My name is Andy Duncan. I reside at Princeton. I am a married man with a family, four children. I have been employed by the Virginian Railway Company around nineteen or twenty years. I was off on a shop strike in 1922. I am one of the men who went out on strike in 1922. I first came back to the company after the strike of 1922, as well as I remember, in October, 1922.

I don't believe this so-called Mechanical Department Association was in existence when I came back after the strike. I believe that was organized after I came back to work. What I know about the organization of it is Mr. G. A. Porterfield and a man by the name of Snyder,

Machinists, employes, held talks in the Machine Shop and they were going to organize some kind of an association. I don't remember if I ever did sign any application for membership. I suppose I was a member of that organization during all the time I worked there. I never did pay any dues. I never did attend any meetings other than when we would meet and nominate our (160) officers for re-election every two years and then after the officers was elected they would hold a meeting between them to elect the System Chairman. I don't know as I can tell the court how I became a member. I held office in this Mechanical Association two times. I don't remember just when the first time was; I believe it was 1926 and 1927. I could not say positively. I was not Chairman at that time. There was two of us. They elected two and the man that got the most votes was Chairman and the next man they called Vice-Chairman. I got the second highest vote and Mr. J. D. Bailey got the highest vote. I was Vice-Chairman for the Boilermakers Craft. I was not Vice-Chairman of the Mechanical Department Association. I don't remember anything that I did during the two years I held office as an officer. I did not call any meetings. The other man who got the highest number of votes, Mr. Bailey, was the man who was supposed to call the meeting if there was any business. I cannot recall of his calling any.

I was elected Chairman of the Boilermakers in the Association in 1933. That means I got the highest vote at that time. I was just elected in 1933 and as Chairman of the Boilermakers during the two years I was in office we did not do anything much more than we were just selected. I suppose I am still Chairman. According to my understanding the Association went out of existence at the time they taken ballots between the two contesting organizations. I don't know anything particularly about another organization being formed after the vote was taken any more than I have heard it talked (161) around that they were forming an independent organization.

I have seen one of these Exhibit No. 23, application for membership in the Independent Crafts Association. Mr. Richards, an employe, presented me with one of them. I think it was during working hours. I did not sign one of these.

Andy Duncan

I think it was the 21st of November, 1933, I joined the International Brotherhood of Boilermakers and Helpers. Prior to the strike of 1922 I had been a member of that organization. When I came back to work in 1922 I was not a member of that organization. I worked for this company from 1922 to 1933 without re-affiliating with the Boilermakers Organization.

I saw the petition that you call my attention to that was circulated about October 5, 1933, in reference to a forty-hour week. The petition was got out and I was handed a copy of it and I passed it on through the Boilermakers. As I understood it that was a petition asking the company to live up to the agreement with the Mechanical Department Association for the forty-hour week. I could not say that it was circulated extensively through the shop. It was just passed from one to the other through the Boiler Department. I served on the Committee that presented it to our Superintendent of Motive Power. I was in the office the day Mr. Sasser called the Committee in; I suppose Mr. Sasser called the Committee in, but Mr. Munsey notified me to come to the office. I cannot say exactly what happened after we got there. The petition was brought up and discussed and Mr. Sasser asked us all around if we did not think (162) it was advisable to drop it as he only had so much appropriation and he had to shut the shop down when that ran out.

I voted in the election held by the National Mediation Board. It was a fair election as far as I could see. I have heard certain witnesses tell how they cast their ballots. I cast my ballot in practically the same way. The vote was perfectly secret.

Cross Examination

During the time I occupied an office in the Mechanical Department Association as Chairman of one of the Crafts Committees I had no official activities in that connection. That does not mean that during that time there were no grievances brought to my attention by the men relative to the conditions of their employment and so forth. There was a superior officer, you understand, that got more votes than I did, and he was supposed to be the Chairman of the Boilermakers Committee and any

activities that were taken by the Mechanical Department Asspeiation during that time would be by my superior officer. I don't remember anything he did during the term of office.

I was elected Chairman of the Boilermakers in 1933, instead of Vice-Chairman. I was elected for a two-year term. I don't know whether there are any provisions in the constitution of that organization relative to the removal of officers during their term of elected office. I don't know of any provision in it which would permit the removal of an elected officer during his term of office.

I became a member of System Federation No. 40 of (163) the American Federation of Labor, I suppose when I joined the National Brotherhood of Boilermakers November 21, 1933.

I said Mr. Richards presented to me an application for membership in the Independent Craft Association. Mr. Richards is not a foreman or an officer of the defendant in any way more than inspector. He is a Boiler Inspector, one of the regular employes. I think at the time Mr. Richards was showing that application to me Mr. Carson, Assistant Boilermaker Foreman, walked through the shop. He walked right close to the flange fire where I was working. He did not stop. He did not inquire what was going on. I think I signed this petition for the forty-hour week; I am pretty sure I did. As a long time employe I had seniority and would have been protected in case of reduction from such a change.

I recall a paper that was introduced in evidence on yesterday wherein I designated Mr. Munsey to represent the Shop Craft Employes in behalf of the Mechanical Department Association. At the time I signed that paper in behalf of the Boilermakers Craft, Mechanical Department Association, I was a member of the American Federation of Labor.

RE-DIRECT EXAMINATION

At that time there was about right close to eighty percent of the Boilermakers that had become members of the Boilermakers Union affiliated with the American Federation of Labor. So that there were only twenty percent of the Boilermakers left anyway who had not

Andy Duncan

(164) joined the American Federation of Labor organization.

I am the Andy Duncan who is General Chairman of the Boilermakers now and named in this petition as one of the plaintiffs.

I attended the meeting on April 28, 1934, at which System Federation No. 40 organized. At that time I think it was figured at about seventy percent of all of the employes in the Mechanical Department of the Virginian Railway were members of the Federation Organization.

Re-Cross Examination

I stated that on August 17th when I filed this authorization designating Munsey as representative of the Association in this connection, about eighty percent of the members of the Boilermakers were members of the Federation. I would not figure that there was but twenty percent of the Boilermakers then also members of the Mechanical Department Association. I could not tell you whether the other members resigned. I say that a small percentage of them remained members of that Association on the basis that the majority had joined the International Brotherhood of Boilermakers. I could not say whether when they joined the International Brotherhood of Boilermakers, of necessity they severed their relations with the old Mechanical Department Association; I don't know whether they would or not. I do not feel that I severed my relations with the old Mechanical Department Association when I joined the International Brotherhood of Boilermakers because the old association went out of existence. I say (165) some eighty percent of the former members among the Boilermakers of the Independent Association had left the Association. I say that because they had joined the American Federation. My point of view is that because their interests were adverse. When I authorized Munsey to represent the Mechanical Department employes I did not mean I was in an adverse faction and authorized him to represent adverse interests to the interests of the Mechanical Department Association. I meant the election should be held there and I did not aim to use any influence either way. I did not

know he belonged to any other than the Mechanical Department. I did not know Munsey was a member of an adverse organization. I knew I belonged to the Federation. I could not say whether it would be called fair or not for me to continue to act in behalf of the Mechanical Department Association when I was a member of the American Federation of Labor Organization.

RE-RE-DIRECT EXAMINATION

I designated Mr. Munsey as the silent observer. He did not have any duties other than to sit there and see that there was a fair election, and to watch the count of the votes. I knew Mr. Munsey at that time. I had confidence in him as an honest man. I was not after anything other than a fair count of the votes and a fair opportunity for the men to vote.

Alonzo P. Wyatt, a witness for the plaintiffs, testified (166) as follows:

Examined by Mr. Mulholland:

My name is Alonzo P. Wyatt. I reside at 116 Hugo Street, Norview, Norfolk County, Virginia. I am a married man with six children. My present occupation is electrical worker, better known as a car dumper operator, with the Virginian Railroad. I judge I have been employed by the Virginian Railroad between seventeen and eighteen years. I first went to work for the company October 5, 1914. I am one of the men who went out on strike in 1922. If I remember correctly, I returned to the company after the strike, in October, 1925. In my present employment I am eligible to membership in the Brotherhood of Electrical Workers. I am located at Sewalls Point Coal Piers. That is a part of the loading of boats. It is within the corporate limits of the City of Norfolk. I never knew of the Mechanical Association having any workers out there. In my employment in the Electrical Department, I did not at any time in my seventeen or eighteen years employment contact the Mechanical Department Association. We were told that the men out there were not considered as members of the

Mechanical Department Association. I had no contact at all with the Mechanical Department Association. When I came back to work in 1925 I was not at that time a member of any local lodge of the Brotherhood of Electrical Workers.

When I came back to work I did have a conversation with an officer of the railroad company as to my rights to join the organization of my choice. When I came back (167) to the office Mr. Hanes was then Superintendent. Of course he presented me with an application to be filled out and also a card—I don't remember just how the card did read now—anyhow it went on to say that I could not take any active part in any of the laboring men's affairs, that I would not join any standard organization. I don't remember just how much the card did state there but the whole meaning of it was if I came back to work for the Virginian Railroad that I could not belong to a standard organization and could not take any part in any of their action or work. I did not take any active part in joining an organization prior to the enactment of the Transportation Act in 1933. Since then I do belong to the National Brotherhood of Electrical Workers. I know that 99 percent of the Electrical Workers who are employed on that pier belong to the standard organizations now. 100 percent of them belonged at the time that the vote conducted by the National Mediation Board for the selection of a representative was taken.

I go to work at 7 o'clock in the morning. I will explain to the court the controversy that we have had out there in reference to the time we work. My regular assignment is from 7 A. M. to 3 P. M. I go to work at 7 o'clock in the morning. We get three hours whether there are any ships in there to be loaded or not. Don't understand me to say we are doing nothing. We keep up all of this mechanical work around there, and they work us for three hours, and if there are no ships in or (168) coming in right away, they knock us off at 10 o'clock. If we have got a little repair job started that we cannot finish by 10 o'clock they will let just enough men finish the job and when it is finished we knock off and go off. If a ship comes in, they work you any number of hours from 7 A. M. to 3 in the afternoon. I am subject to call at any time of the day or night.

In the organization of the Electrical Workers Local Lodge of which I became a member, I was selected an officer. My position at the present time is Secretary and Treasurer of the Local Union, Local 671 of the International Brotherhood of Electrical Workers. I am also General Chairman of the Electrical Workers on the entire System of the Virginian Railroad. I am one of the officers elected on the 28th day of April, 1934, when the System Federation was organized. I am one of the plaintiffs in this case. As General Chairman, I have attempted to take up with the officers of this railroad the case of Carl Young, Electrical Worker at Mullens, West Virginia, that has arisen since the certification issued by the National Mediation Board. I took that up by writing to Mr. John Sharpley, whom I understand is Electrical Engineer or Electrical Supervisor. He did not answer that letter. I wrote him again and he did not answer the letter. My first letter I think was dated December 31, 1934, and my second letter was dated January 21, 1935.

CROSS EXAMINATION

By Mr. Hall:

I say I was not a member of the Mechanical Department Association. I am an operator of one those elec-
(169) trical machines that is used in dumping at the pier, a car dumper operator. I did not say the car dumpers have never been considered part of the Mechanical Department. I did not say that I was told that I could not join the Mechanical Department Association. Mr. E. D. Hanes said we did not come under it at all. I don't know what his reason was for it. I am not able to say that was because we were not considered a part of the Mechanical Department employes under Mr. Sasser. Mr. Hanes told me that we did not come under this agreement at all, were not covered by it. I don't know whether that has been the case ever since that Association has been in existence; I don't know how long the Association has been in existence. The car dumper operators have not been considered members of the Mechanical Department of the Railroad according to the agreement that was on the System. My immediate superiors are Mr. C. R. Cunningham and Mr. Masten. Mr.

Masten is connected with the Operating Department as Superintendent of the Eastern Division of the Virginian Railroad, and all of my relations in connection with my work are through Mr. Masten as Superintendent. I don't know how you could figure that we men are not under the authority of Mr. Sasser who is Superintendent of Motive Power. You surely could not call it anything but mechanical work. It don't make any difference whose head it comes under, it is mechanical work. I don't know whether Mr. Masten is Superintendent in the Operating Department. I don't know just what his title is. I do know he is Superintendent, or they tell me he is, of the Terminals. I don't know that he is the Superintendent of the Division from Roanoke east to Norfolk; that is the company's affairs, and not mine.

Re-Direct Examination

So far as I know there has never been any agreement (170) covering the men employed on that pier since I have been back there. I was told by Mr. Hanes that we did not come under the agreement.

Wyndham S. Penturff, a witness for the plaintiffs, testified as follows:

Examined by Mr. Mulholland:

My name is Wyndham S. Penturff. I reside at Mullens, West Virginia. I am a married man and have three children. I have been employed by the Virginian Railway this last time about eleven years and five months. My total period of employment would be approximately eighteen years. I first came to work for the Virginian in 1914. Then I was out for a little time, I was in the army during the World War for about two years, something like that.

I don't believe I can tell the court anything about how this so-called Mechanical Department Association was organized. I do not know how I became a member of it, if at all. I never did pay any dues or assessments. I don't believe I have ever attended any meetings during the time of my employment other than the bi-ennial

meetings for the election of officers. We have had some meetings down there but they were not called by the Mechanical Association.

I do recall a meeting called by Master Mechanic G. T. (171) Strong, but I don't exactly remember the date of that meeting. The purpose of that meeting was a wage-cut. That was about the time that the Standard Railroad organizations had met with the Management of Class 1 Railroads in Chicago and agreed to a ten percent reduction. At this meeting called by Master Mechanic Strong, he put a notice on the Bulletin Board that there would be a meeting called. There is a little house there, a kind of shanty that we call the Club House. We all went there and Mr. Strong had a letter from Mr. C. H. Hix, President of the Virginian Railroad at that time, asking us, on account of the financial condition of the road, to accept a ten percent reduction. The way we proceeded in the matter of reduction of wages was one man made a motion that we accept it and another man seconded it, and it was voted on and we all signed the paper. The Mechanical Department Association or none of its officers had anything to do with that meeting.

I never did attend any meetings during all those years that were in charge of the Mechanical Department Association officers. I ran twice for office in the Association. I was elected one time on a committee for the blacksmiths. I did not do anything as a committeeman for the blacksmiths.

I have seen this application for membership in the Independent Shop Crafts Association marked Exhibit No. 23. They appeared after the election held by the National Mediation Board. The first I saw was after the election. I cannot give you any information as to whether they were circulated through the shops on com- (172) pany time. I never signed any.

R. W. Johnson, a witness for the plaintiffs, testified as follows:

Examined by Mr. Mulholland:

My name is Robert Walter Johnson. I reside at Roanoke, Virginia. I am employed by the Virginian Railway Company and have been employed by them since April

20, 1920, except I got off on a leave of absence for about three months. I am car repairman at Roanoke.

I have not any information as to how the Mechanical Department Association was organized. I may be a member of it. If I voted at the bi-ennial elections held at the shops I don't remember anything about it. I never did pay any dues. I never did attend any meetings. No one ever asked me to pay any dues or any assessments in the Mechanical Department Association.

During the time that I have been working for the Virginian Railway Company since the strike, I have not belonged to any of the labor unions commonly known as the Federation. I did belong to the Car Men's Organization before the strike. That is the Brotherhood of Railway Car Men of America. I joined that organization in 1934 sometime; I cannot just recall the date. I think I was a member of that organization when I went to vote in the election held by the National Mediation Board. The way I cast my ballot I went to the Foreman's office and they handed me a ballot. I cast my vote like I would (173) in a general election.

In response to questions by the Court: I cast my ballot like we do in electing our Presidents and like that. I just went to a little desk they had right opposite the desk that belonged to the clerk and made a mark. I don't think I made it on that desk.

By Mr. Mulholland:

Nobody could see how I was marking my ballot unless they would get up and stand right beside me and look at it. I don't know how many votes were cast. They did not have booths at Roanoke. I went away from everybody to a table where I marked my ballot. Like this was the table for the Clerk and the Mediator I stepped back on, a little more like a pigeon hole box, and marked my ballot. I don't remember whether they had a booth or something arranged to hide me. So far as I know it was a fair election in the casting of my ballot. After I marked my vote I folded it once and handed it to the Mediator and he put it in the box in my presence.

By the Court:

Nobody in the place where I voted made any suggestion to me one way or another as to how I should vote.

Ernest R. Belcher, a witness for the plaintiffs, testified as follows:

Examined by Mr. Mulholland:

My name is Ernest R. Belcher. I live at Princeton. I am an employe of the Virginian Railway Company and have been for about fourteen years. The last ten years I have been employed as an electrical worker, and prior to that at various works. I first went to work there in March, 1918. I did not go out on strike in 1922. I was (174) just working as a laborer at that time.

I do not know anything about the organization of the Mechanical Department Association among the employes. I had nothing to do with it. I did not know about it when it was organized. I suppose I did become a member of it. I don't remember ever signing anything. I never paid any dues. I attended the bi-ennial meetings to select officers, that is all. I never did hold an office.

I joined the International Brotherhood of Electrical Workers in July, 1934, and I am a member now. I was present at the organization of System Federation No. 40. I was elected Secretary-Treasurer and I still hold that position.

I cannot say when this Exhibit No. 23, which is an application for membership in the Independent Shop Crafts Association, first appeared in Princeton, because I have never seen one of them. No officer of the Virginian Railroad Company has talked to me in reference to my labor affiliations.

Mr. Mulholland: Plaintiffs rest.

L. A. Markham, a witness for the defendant, testified (175) as follows:

Examined by Mr. Donnally:

My name is L. A. Markham. I am an officer of the Virginian Railway. My position is assistant to the President. The principal matters under my jurisdiction in that connection are labor matters, expenses, or any other matters that may be assigned by the President.

L. A. MARKHAM

In 1922 I was occupying the position of Superintendent of Labor on the Virginian Railway. And my duties in that connection were as indicated by the title which I have just stated.

I am informed concerning the organization of the Mechanical Department Association of the Virginian Railway employes. That association was formed in October, 1922. The occasion for the formation of that organization was in order that the employes in the Mechanical Department could have a representation before the United States Railroad Labor Board in the matter of rates of pay, rules, and working conditions. The United States Railway Labor Board had taken action in that connection. The paper you show me is a resolution passed by the United States Railroad Labor Board, dated July 3, 1922. The Virginian Railway received an official copy from the Railway Labor Board.

Mr. Donnally: The defendant asks that this be marked as Defendant Exhibit C.

By Mr. Donnally:

I read the third and fourth paragraphs of that resolution: (Reading): "Whereas, in the future submission of disputes involving rules, wages, and grievances (176) of said classes of employes of the carriers, it will be desirable, if not a practical necessity, for the employes of each class on each carrier to form some sort of association or organization to function in the representation of said employes before the Railroad Labor Board, in order that the effectiveness of the Transportation Act may be maintained; now, therefore, be it resolved that it be communicated to the carriers and the employes remaining in the service and the new employes succeeding those who have left the service, to take steps as soon as practicable to perfect on each carrier such organizations as may be deemed necessary for the purpose above mentioned."

This resolution is dated July 3, 1922. There was a strike that extended to the employes of the Virginian Railway that occurred on July 1, 1922. The American Federation of Labor, through its Railway Employes Department participated in that strike on the Virginian Railway. At that time the employes in the Mechanical Department were represented by System Federation No.

40 of the Railway Employes Department of the American Federation of Labor. The Railway Employes Department of the American Federation of Labor attempted in every way to keep the railroad from operating. It made every effort through its agents and employes that went on strike to stop the operation of the railroad. Those efforts were confined to intimidation of the men that we employed and it was to such an extent that it became necessary for the railroad company to house and feed the new employes on the railroad's premises. That was done for the protection of the new employes. The (177) situation became such it was necessary for the Railway Company to go into court and ask for an injunction against the American Federation of Labor and those affiliated with it.

That relief was sought in the United States District Court for the Western Division of Virginia and for the Southern District of West Virginia. The injunctions were secured.

Around October 1, 1922, the employes of the railroad formed their organization. They communicated to the Virginian Railway relative to that organization. The paper you show me is a letter signed by F. M. Billmyer, General Chairman System Board Mechanical Department Association, Virginian Railway Company, addressed to Mr. C. H. Hix, Vice-President of the Virginian Railway Company, Terminal Building, Norfolk, Virginia, dated October 30, 1922, which is filed as Exhibit D.

The paper you show me is a letter dated November 2, 1922, addressed to F. M. Billmyer, Victoria, Virginia, signed C. H. Hix, Vice-President, in answer to Mr. Billmyer's letter of October 30. The second paragraph of that letter reads "The Virginian Railway Company grants your Association full recognition to represent the Motive Power Department Crafts making up your Association, and herewith encloses proposed agreement." Said letter is filed as Defendant's Exhibit E.

The Virginian Railway Company never has to my knowledge undertaken to influence the policies of that Association. I have never attempted to influence its policies. So far as I know the Virginian Railway Company or myself as its officer in charge of labor relations, (178) has never attempted to dictate the election of officers of that Association. The contributions that have been made by the Virginian Railway Company to the ex-

penses incurred by that Association average about $100 per annum. Those expenditures were made primarily to perfect the Adjustment Boards authorized by the Railway Labor Act of 1926. They did not include any printing expenses, only traveling expenses. Under the provisions of the Railway Labor Act the right was given employes on the various Class 1 railroads to have representation either before a National Board, Regional Board, or Carrier Boards. The men on the Virginian accepted the Local Adjustment Board. It was formed, composed of three representatives of the Railway and three of the employes. The agreement provided that the Chairman would alternate yearly. That Adjustment Board accepted the Mechanical Department Association as the representative of the Virginian's Mechanical Department Employes for the purposes of the Board. I have had occasion to investigate the matter of the expenses undertaken by the Virginian in connection with this independent organization. It is on the basis of that investigation that I said the approximate average annual contribution was $100 a year. The occasion of that investigation was that I had a letter from the Federal Coordinator, Mr. Eastman, inquiring into the Independent Associations on the various railroads, and whether or not the Carriers were violating the Emergency Act of 1934 in contributing to the support of any independent organization.

(179) Now, proceeding on down to 1934, the Virginian Railway Company received a letter dated March 7 from Mr. B. M. Jewell, President of the Railway Employes Department of the American Federation of Labor. The paper you show me is the letter to which I refer. It is dated March 27, 1934, and is filed as Defendant's Exhibit F.

Mr. Jewell in that connection stated that he had been designated by the Employes of the Mechanical Department, consisting of the six crafts, the Engineers and Oilers, Power House Engineers, Round House Laborers, in the matter of representation with the company. After that letter was received from Mr. Jewell the Virginian Railway Company received a telegram from George A. Cook, the Secretary of the National Board of Mediation, regarding this matter of representation. The paper you hand me is a copy of the letter which Mr. Cook sent to the defendant, and is filed as Defendant's Exhibit G.

Mr. Cook, the Secretary of the Board of Mediation, asked Mr. Bucholtz, the President of the Defendant what he had to say with respect to Mr. Jewell's request. The letter you show me is Mr. Bucholtz's reply to Mr. Cook's inquiry. It is dated April 24, 1934, and is filed as Defendant's Exhibit H.

That letter reads:

"Norfolk, Virginia, April 24, 1934.

"Mr. George A. Cook, Secretary,
United States Board of Mediation,
Washington, D. C.

"Dear Mr. Cook:

"Referring to your letter of April 17, File No. C-932, (180) with reference to petition of the American Federation of Labor.

"We do not understand this situation for the reason that the American Federation of Labor does not represent the Shop Employes of the Virginian Railway. We have an organization that was created under the provisions of the Transportation Act in 1923, which organization has been functioning satisfactorily to the employes and to the company ever since and is actively functioning at the present time.

"There is no dispute with these employes and therefore as we see it there is nothing at the present time to mediate, and we do not feel that the services of the United States Board of Mediation are required. We would be glad to receive a copy of the petition indicated by the second paragraph of your letter. We thank you for the tender of your services.

Yours very truly,

(Signed) C. BUCHOLTZ,
Vice President and
General Manager."

With respect to the matter mentioned in Mr. Jewell's letter, Mr. Cook's telegram and Mr. Bucholtz's reply the Board of Mediation sent a Mediator on the property

shortly afterwards. That Mediator was Mr. Bronson. My recollection is he came to the Virginian property in the early part of June. We came to the offices of the Virginian Railway and introduced himself, stating that he was here for the purpose outlined in Mr. Cook's tele-
(181) gram. I talked to him. Mr. Bronson did not then proceed with any investigation. We advised him in line with the letter that we had written Mr. Cook stating that there was nothing to mediate and no dispute on the property and from our view point there was nothing for him to offer his services for. Mr. Bronson then returned to Washington. There was not in fact any dispute existing among the employes of the Virginian Railway as to who should represent them for the purpose of collective bargaining or otherwise, of which we had been advised by the employes. If any such dispute had existed I would have had information regarding it. The next action of the Board of Mediation in regard to the matter of representation of the employes was that they sent another Mediator here on July 5, Mr. Reed, for the same purpose. Mr. J. J. Duffy, representing the American Federation of Labor, was here.

There was a conference between the representatives of the Carrier, Mr. Duffy representing the American Federation of Labor, and Mediator Reed regarding further procedure. Mr. Duffy had petitions or authorizations signed by various classes of employes who he stated worked on the Virginian, and it was agreed at this conference that we would check those petitions. It was agreed that they should be checked by the three, Mr. Duffy, Mr. Reed, and me. That check was made. The result of it was that on the petition were 485 signatures and, after eliminations due to classes of employes not engaged in work in the Mechanical Department, duplications of signatures and various other causes, it was re-
(182) duced to 408. I have a memorandum in our files from Mediator Reed to that effect. At that time there were in the Virginian Railway Mechanical Department 845 employes, that is including those recognized as Shop Craft Employes. All classes of employes were included in this check requested by Mr. Duffy and acceded to by the Board of Mediation, including the roundhouse laborers, the shop laborers, firemen and the oilers, but, on his petition there were no signatures of either roundhouse laborers or shop laborers. There was one fireman

and oiler. The balance were members of the various crafts. The total number of Virginian Railway employes in the crafts covered by this check requested by the American Federation was 1058.

Following that check by Mediator Reed relating to the desire of the men for representation and his report on the result thereof, we received a wire from the National Mediation Board in Washington stating that a suit had been filed with it and they were sending a Mediator on the property. Three days after the check begun Mr. Duffy, representing the American Federation of Labor, filed a request with Mr. Reed to withdraw the roundhouse laborers and the shop laborers and firemen and oilers from his request for representation. The paper you show me is a letter from Mr. Duffy, representative of the American Federation of Labor, addressed to Mr. H. H. Reed, Federal Mediator, Fairfax Hotel, Norfolk, Virginia. That is the letter to which I last referred, and it is filed as Defendant's Exhibit I.

A copy of that letter came to the Virginian Railway. (183) I did receive a communication from the Board of Mediation relative to Mr. Duffy's request. I got a wire from Mr. Cook in which he stated that similar request had been filed by Mr. Jewell and that the Board had accepted the duty. I, as an official of the Virginian Railway, wrote to a representative of the Board of Mediation relative to request made by Mr. Duffy for a change in the employes to be included in that check. The paper you show me is the communication that I now refer to. I take the position in that letter, in a general way, that inasmuch as Mr. Jewell's letter of March 7 had designated those employes and when we started into the check it was on that basis, we did not feel he had the right to withdraw any classification mentioned in that letter. Said letter is filed as Defendant's Exhibit J.

I have referred to a statement or memorandum of report made by Mediator Reed relative to the result of his check of authorization. The paper you hand me is a memorandum made by Mr. Reed, dated July 16, 1934, made in my office in the presence of Mr. Duffy. That original memorandum was signed by the Mediator. Said memorandum is filed as Defendant's Exhibit K.

Leaving this check that Mediator Reed began and reported on the next communication after that incident which the Virginian Railway received relative to an in-

quiry into its employes representation was a wire from the National Mediation Board stating that this dispute had been referred to it by the Railway Employes Department of the American Federation of Labor and it was (184) sending a Mediator down to handle it. The paper you hand me is the telegram to which I referred, dated August 10, 1934, and is filed as Defendant's Exhibit L.

This paper which you hand me is a letter from Mr. Bucholtz addressed to the Board in reply to that telegram, dated August 10, 1934, and it is filed as Defendant's Exhibit M.

The Mediation Board did not accede to the proposition of the Virginian that there be no further inquiry. It sent Mediator Bronson. Mr. Bronson came down to the Virginian property arriving on Monday, August 13th. The further proceedings that were had then in regard to this investigation were that Mr. Bronson came into my office that morning and stated the purpose for which he was there and he left and said he would return the next morning, Tuesday. The following morning he came in with the rules and regulations to govern the election. We reviewed those rules and regulations. When we reviewed those with the Mediator Mr. Loyall, our Attorney, was present with me. We took exception to the first rule which provided that the majority would represent the legal votes cast. Our position was that the majority should represent the voters shown on the eligible list. The Mediator agreed that our contention was proper, and changed the rule accordingly.

We had a further conference that afternoon when Mr. Bronson returned with Mr. Bentley, representing the America Federation of Labor, and we again went over the rules and he asked Mr. Bentley if they were satisfactory. Mr. Bentley said they were with that exception (185) of the change which was made that morning in the rule governing the majority. At that conference in the afternoon there were present Mr. Bentley, Mr. Bronson, Mr. Sasser and me. There was nobody there representing the Mechanical Department Association.

When he came to the matter of representation for the Mechanical Department Association, Mr. Bentley suggested the name of Mr. J. W. Munsey. We objected to Mr. Munsey on the ground that he did not represent the Mechanical Department Association. The Mediator, after the matter was explained to him, agreed that Mr.

Munsey should not represent the Mechanical Department Association due to his past affiliation with the American Federation. Mr. Bentley insisted and would not accept Mr. Bronson's decision and insisted that he call the Mediation Board in Washington. Mr. Bronson did call the Board in Washington, in my presence and also in the presence of Mr. Sasser and Mr. Bentley, and stated the case and gave his opinion regarding it to the effect that he agreed with the railroad that Mr. Munsey was not a proper representative for the Mechanical Department Association. He was asked if Mr. Munsey was still Chairman of the organization, if he had ever been displaced, and the Board was advised he had not. He was then instructed that Mr. Munsey would have to represent the Mechanical Department Employes from the fact that he was still Chairman of the Association.

At this conference held in the afternoon of August 14, which I have been describing, I asked Mr. Bentley (186) what right he had to designate or insist on the designation of Mr. Munsey as representative or observer for the Mechanical Department Association and he stated that he had been in telephone communication with the men at Princeton, the representatives on the System Board, and they advised him that Mr. Munsey should represent the Mechanical Department Association. I know one of the persons whom he said he had communication with was Andy Duncan. The rules as drawn were signed at that conference after the Mediator asked Mr. Bentley if he had any objections to them. Mr. Bentley stated that he had objected to the change in the rule governing the majority and was told by the Mediator that regardless of his objection it was the law and he would have to accept it. Mr. Bentley stated that it was only under that condition that he would accept the rule. The paper was authorized to be signed by Mr. Bentley who at that time suggested that it be signed by the Railway Company and the Mediator asked us if we objected, and we had no objections, and he signed, Mr. Bentley and the Railway Company signed. The exhibit No. 2 is the agreement that was then and there signed by Mr. Bronson in behalf of himself and the other two. It was agreed at this conference with the Mediator that a Bulletin would be posted to the effect that the foremen would notify the men when they would be needed for voting. That form of Bulletin was reduced to writing at

that conference. The paper you hand me is the Bulletin dated August 16th, and same is filed as Defendant's Ex-
(187) hibit N.

I was not present at the voting in the first election at Princeton on August 16th. The only report ever made by the Mediator Bronson relative to the result of the August 16th voting at Princeton was a statement that he made that he did not see or could not see in any way that the election was unfair. I do not know how many men voted at the Princeton election of August 16, 1934. There were in the Mechanical Department of the Virginian Railway at the time of that election approximately 820 employes. I am not prepared now to divide those men into the six crafts.

After the receipt of the certificate from the National Mediation Board the Virginian Railway Company addressed a communication to that Board relative to the matter involved. The paper you hand me is a letter dated November 19, 1934, addressed to the National Mediation Board and is the communication to which I refer. Said letter is filed as Defendant's Exhibit O.

In 1929 we received notice from the Mediation Board that the International Association of Machinists had filed with it a statement that the Virginian Railway had dismissed various employes, members of that organization, for their affiliation with it, and sending a Mediator down to investigate the matter. The result of that investigation he outlined in a letter that he subsequently wrote after his return to Washington.

AFTERNOON SESSION

(188) May 23, 1935.

L. A. Markham, resumed the stand for further direct examination:

I was present at a conference held in Princeton, West Virginia, in December, 1934, which has been referred to in the course of this hearing. That was held December 27, 1934. The letter which you hand me dated December 20, 1934, is a letter from Mr. Walter G. Burton, Attorney-at-law, Princeton, West Virginia, addressed to Mr. C. Bucholtz. That letter was read at the Princeton conference, and is filed as Defendant's Exhibit P.

The letter you hand me dated December 23rd is a copy of Mr. Bucholtz's reply to that letter from Mr. Burton, and it is filed as Defendant's Exhibit Q.

Mr. Donnally: I might explain that these were letters that were referred to by Mr. Gorman of which he never received copies. He referred to them as having been read at the Princeton conference.

The printed pamphlet attached to Defendant's answer as Exhibit No. 1, is the agreement between the Virginian Railway Company and employes of the Mechanical Department represented by the Mechanical Department Association. That agreement was effective November 15, 1922.

As assistant to the President I have participated in the consideration of grievances brought to the attention (189) of the management on the part of the employes. A committee of the Mechanical Department Association covered by that contract between the Railway Company and the Mechanical Department Association represented the employes in connection with these grievances. So far as I know the Virginian Railway Company has never discharged an employe because of labor affiliations. The policy of the Virginian Railway Company is that it has always recognized the rights of its employes to choose their representation.

Mr. Donnally: The witness is turned over for cross-examination.

The Court: I don't know whether this question is proper or not. Is it the position of the defendant that it would not hear these men or treat with them because it did not recognize the validity of that election or just did not have time to do it, which?

Mr. Donnally: I think I may say that there was at that time and is now in existence and has been at all times that these gentlemen have asked for conference, an agreement between the defendant company and its Mechanical Department employes which has been introduced in evidence as Exhibit R.

The Court: Probably I did not make clear what I

wanted. It appeared from the testimony on yesterday, I don't know what will be the remainder of the testimony, that the representatives of the Federation claimed to have had numerous appointments with the President of the Railroad and tried to see him at other times and were never able to see him and negotiate with him. What the court had in mind was, was that due to the fact that the Railroad Company refused to recognize this election as a valid election, or was it due to the fact that they just did not have time and it was not an appropriate time for the President to negotiate with them?

Mr. Donnally: The delay in meeting these gentlemen in the meeting that did eventually take place in Princeton, the delay was not due to this element that your Honor mentions of declining to recognize these men as the duly constituted representatives of other employes (190) in the Mechanical employment for the purpose of collective bargaining. I do not think the delay in meeting them was due to that. It was due to miscellaneous minor incidents and absences and the fact that the President was busy, but he did meet these gentlemen; but, we say it frankly, that the defendant has not accepted this organization as the duly appointed representative.

The Court: It may be that you will prefer to deal with this question I am about to ask you now, in the evidence rather than to answer it at this time, but what is running through my mind is did the defendant promptly after this election take and hold the position that this election was invalid and of no effect?

Mr. Donnally: They did but they did not for that reason delay meeting Mr. Gorman and these other men when they sought to have an interview. The management of the Virginian is always ready to confer and meet with any gentlemen who wants to talk to the management in good faith.

The Court: Without expressing any opinion on the evidence, it seemed to me like it was simply a matter that they could not get together at the time. I was wondering what position they took.

Mr. Donnally: The defendant took the position from the beginning that this election was invalid, that the certificate was void, but that was not the reason, so far as I can determine, that there was a delay in meeting these people that wanted to talk about the matter.

The Court: Go ahead with the testimony.

CROSS EXAMINATION

By Mr. Brandt:

From the very beginning when the Mediation Board was called on in this matter, or their services were invoked, I, as the representative of our company objected to that course of procedure because I took the position that there was no disagreement amongst the men. I did not state that I also objected because I did not see any occasion or necessity to have any relationship or contact of any kind with any branch of the American Federation (191) of Labor.

I have introduced a letter in evidence here signed by Mr. Billmyer, marked Defendant's Exhibit D, which was addressed to Mr. Hix, the then President of the Virginian Railroad, a copy of the reply of Mr. Hix as Defendant's Exhibit E is in this record. I could not say whether Mr. Billmyer at that time had an office for the transaction of business of his own as the General Chairman of the System. I could not say whether he had the services of (192) a stenographer at that time. Mr. Hix had an office of his own and, of course, he had a stenographer. I have not any way by examining the copy of the letter known as Exhibit E of telling what stenographer wrote that letter in Mr. Hix's office. There is nothing to indicate on Mr. Billmyer's letter that it was written by a stenographer at all. I have not the least idea where this Billmyer letter was written only from where it is dated. It is dated at Princeton, West Virginia. I had not seen Mr. Billmyer nor had a discussion with him of any kind about this railroad company's Mechanical Department Association prior to the writing of this letter. The first I heard of it was when Mr. Billmyer addressed this letter to me; which was addressed in conformity with the requirements of the Transportation Act. There has been no suggestion by me or any of the officials of the Rail-

road to Mr. Billmyer or to any other employe of these various crafts that they should form this Employes' Association, except the resolution of the Labor Board. After we received a copy of the resolution of the Labor Board, we gave the information to our employes in the Mechanical Department, by a Bulletin which was supposed to have been posted at various places along the road. I did not prepare the Bulletin. I have not the least idea who prepared it. It was posted, I imagine, by the Superintendent of Motive Power.

I have stated that the Railroad Company contributed (193) approximately $100 a year towards the maintenance of that Union. We did not have any agreement with the Chairman or Mr. Billmyer or any other representative of any of those crafts as to how much we would contribute and what the limit of our contribution and support would be. The only bills we approved were in the matter of the Adjustment Board. We did furnish, as I said, transportation to the men in order that they might attend meetings whenever it was necessary. We also furnished maintenance on those occasions, hotel bills, and the like.

Before the strike, the workers on our railroad were members of the various crafts affiliated with the American Federation of Labor. And after this strike, pursuant to the suggestion of the Labor Board, the company officials of course cooperated with the men to the last degree in order to enable them to have representation before the Railroad Labor Board, not to enable them to organize. It was more in the interests of the men than it was in the interests of the company to have them organize so that they would have some accredited person to negotiate with in case of disagreement. I did not think it was in the interests of the company at all under the provisions of the Railway Labor Act for we had always been negotiating with our men prior to the time of the strike. Prior to the time of the strike we negotiated with the officers of System Federation No. 40 which were all affiliated with the American Federation of Labor as far as we knew. We did not render these men (194) any assistance in the framing of their constitution, only after they had framed it they asked the company if they would not look it over and smooth it out. I did not call in any of my associates or employes to assist them in that behalf; I did it. I did not call on counsel

while I was doing that. I felt that I was fully qualified without having any legal advice, to take care of that situation.

Now, in connection with the agreement, which is a rather elaborate agreement, the System Chairmen and the Chairman of the various crafts whose names were signed to this agreement of 1922 had all this prepared and typed out and submitted it to me in that form before I passed on it. If I remember correctly when we got the letter from Mr. Billmyer we drew up a form of agreement, a tentative form of agreement, and submitted it to Mr. Billmyer for the consideration of himself and his committee. I drew it. I did not feel it was necessary to call upon counsel to prepare the agreement. I had prepared agreements of this character before and I had before me other agreements that I had drawn prior to this, which were of assistance to me in the preparation of this agreement. I might say that the basis of that agreement, practically, was the agreement that existed between System Federation No. 40 and the Virginian Railway prior to the time that the employes went out on strike, with such modifications as I felt would then meet the existing situation but those modifications (195) were not accepted by the men. I could not say in what respect the original agreement was modified under which those Standard Union Employes worked, to what extent it was modified by this agreement prepared by me. I could not say in detail to what extent. It was not with respect to hours of labor. The pay, or the basic day and such as that were the same. When that agreement was made the law creating the Adjustment Board was not in force, so that it was not modified in respect to the manner in which the Adjustment Board should be appointed. I submitted this to Mr. Billmyer in typewritten form. I don't think I have the original draft that I submitted to him. I sent it to him through the mails to Princeton.

After submitting the contract we arranged a date for a conference and went into negotiations, and there modified and revised the agreements that were submitted between us. That conference was held at the Roanoke Hotel in Roanoke. There were present at that conference Mr. Sasser and I, and Mr. Billmyer and his Committee, that is, the Committee who signed this contract. This agreement provided for all crafts it covered.

It did not provide for at least forty hours per week for certain crafts, only to the extent that it provides that before forces are reduced, forty hours may be established. The matter of forty hours has not been the subject of discussion with me time and again by the men. No one ever complained of the failure to get that full time. I have heard the testimony of these men. The position I held was Vice President in charge of personnel. I have general charge of all labor matters on the road. (196) I have heard the testimony of these several witnesses here to the effect that they had importuned the Foremen of their shops or other persons in authority on the railroads to give them the benefit of the forty hours as provided by that agreement. I had never heard anything about that. Nobody ever brought it to my attention. I was in constant contact with Mr. Sasser in connection with the performance of my duties and he really was the official that controlled the actual services of the men in the Shop Department. If he thought it was necessary it was a most natural thing for him to discuss with me any matter of disagreement with the men on any subject that affected their hours of labor or wages. He did not always discuss these matters with me when they arose. Mr. Sasser did not bring to my attention, if he knew any matter of complaint on the part of the men with respect to the forty hours. I knew only through hearsay about the circulation of a petition some years back by the men in the shops in Princeton and elsewhere in West Virginia requesting the restoration of the forty hours. I heard it through the men in going over the road. I made a practice of going over the road at stated intervals to see exactly what conditions existed as to labor; that was one of my duties. I did not hear about the presentation of this petition asking for the restoration of the forty hours. I did not know anything about the occurrence that has been testified to here that the Foremen in charge of them, one of the men said Mr. Sasser, when this petition was presented, told him that he had better withdraw it, that it (197) would be very much in his interest. Mr. Sasser did not tell me anything about that. If that did occur and that was the basis of complaint, even that one thing, that was some evidence of dissatisfaction but it was not a violation of the contract, according to the language of the contract.

Q. If the men felt that their construction was proper and under their construction they felt they were entitled to a minimum of forty hours and asked for it, and they were refused any consideration in that behalf and told that they had better not press that request, would you consider that a peaceful condition and a contented condition of affairs amongst the laborers on your road? A. I would, because they were making forty hours a week.

Q. They were? A. Yes, sir.

Q. Then, they would be doing a ridiculous thing in asking for something which they were already being given? A. That is exactly what they did.

Q. They were asking for something that they were already getting? A. Exactly.

This local Adjustment Board was composed of three officials of the Railroad and three employes after it was organized. The employes' representatives on the last Adjustment Board were Mr. Preston, Mr. Hunter and Mr. Kale, and the officials of the Railroad were Mr. Sasser, Mr. Masten and me. Mr. Sasser was in direct control of all the Shop Crafts of the Railroad. All three of the men whom I mentioned, Mr. Preston, Mr. Hunter and Mr. Kale, were shop employes.

The Union that existed prior to the strike was an accredited Standard Federation Union as far as I know. After the strike this independent organization was formed; I would not say it was a company union. I would not say that just as soon as the services of the Mediation Board were invoked and a ballot cast and a (198) certification based upon that ballot was made by the Mediation Board, that this Independent Union began to disintegrate. As far as I know it exists now in a sense. The minority of that Association are still members of it. The Association does not at this time deal with the Virginian Railroad; if it functions it may not function with the railroad. So far as the organization is concerned, I would not say that it ceased to exist, but the railroad ceased negotiations with it. It was an unincorporated voluntary association. I would not say that after the certification by the Mediation Board it ceased to function for the purpose for which it was formed.

We did not organize any such Association as the other

Association called the Independent Shop Crafts Association. I have not the least idea when it was organized. That is not the Association with which our railroad now deals. We are not dealing with the Independent Shop Crafts Association. We do not have a contract with them, and have never had any agreement of any kind with them since this certification. I have not the least idea who the officers of the Independent Shop Crafts Association are and I don't know when it was organized. I could not tell you whether it is a corporation. I don't know where its headquarters are located. I know absolutely nothing about the organization of this Independent Shop Crafts Association or its personnel or its membership, or whether or not it functions. It does not function with the railroad. As far as I know of my own knowledge it does not exist. I do not know to my personal knowledge whether or not Mr. Hearne is at all (199) connected with the Independent Shop Crafts Association. I have heard that he is. Mr. Hearne is now employed by the railroad in the capacity of car man. He was Chairman of the Car Men of the Mechanical Department Association. I could not tell you whether the Car Men still have an organization of any kind; I don't know that. I don't know whether or not the Boilermakers have an organization of any kind at this time. I don't know whether the Sheet Metal Workers have an organization of any kind at this time. I have had absolutely no dealings with any organization of any kind since this certification by the Mediation Board of System No. 40 as the representative of the employes of the Virginian Railroad in those crafts. I have had absolutely no dealings with System 40, either. It is not correct that we have declined to deal with them because we felt that we were not called on to recognize the certification by the Mediation Board. We have not declined to meet them. We have questioned the authority of the certificate issued by the Mediation Board. We did not protest the certification before it was issued, we questioned it since it was issued; we protested holding the election. If the election was held under the law I would regard it as a fair means of the men expressing their desire as to who should represent them by holding a secret election without the restraint or interference of anybody. I think that part of the rules and regulations issued by Mr. Bronson, the Mediator, specifying that the majority

of the legal vote cast, was contrary to the Act. I am (200) familiar with the Act and I think that is contrary to the Act. I don't know what section of the Act it contravenes, but I know it says the majority of any craft or class. I think that because, if the Act did call for the majority of those qualified to vote, whether they voted or not, the election would be void because it was not in accordance with the law. That is my interpretation of the law. I did not feel as Vice President in charge of personnel that I had a right to dictate the manner in which these men should hold their election. We objected to the election for the reason that we felt we had a right to know that the representation on the railroad was selected as the law provides and that the men that we had to recognize as those representatives might be elected in that way. It is not correct that I was insistent that my construction of the law should be complied with as the prerequisite to recognizing the election. We simply took that position. It is not correct that having taken that position and being of the opinion that what followed was not in conformity with the position we took that we then refused to recognize the certification. We have not refused to recognize the certification. We took exception to the election and we had our counsel go to Washington and take it up with the Board and undertake to have the Board set aside the election. The Board's answer to that was that I should deal with the Crafts that were properly elected. We have not refused to do that. We have not dealt with them.

By the Court:

Q. What reason, Mr. Markham, has there been for (201) not dealing with System Federation 40? A. Why, Judge, there is no reason for not dealing with them. The correspondence with the men indicates that we neither had the opportunity nor the time.

Q. Those requests, if I recall correctly, were made as early as November of last year and were continued on up, I suppose, until the latter part of December last. You had no opportunity to deal with them during all that time? A. No, sir. Mr. Bucholtz was engaged in various other matters, which were tremendous, and he just did not have an opportunity to make an engagement until December 27.

By Mr. Brandt:

Q. Is not it the fact, Mr. Markham, that Mr. Bucholtz himself fixed the 14th of November as the date upon which he would meet the Committee of the System Federation representatives in order to take up their grievances with them, and himself changed the date, postponing it to an indefinite time which was never subsequently positively agreed upon? A. I think the date of November 14th was contingent, and not definite.

Q. The letters in evidence, as I recall, and maybe I am in error. If I am I want to be corrected. The letters in evidence show that in the beginning that a definite time, to-wit, November 14, 1934, was fixed, and the testimony, as I recall it, was that on the 9th of November a telegram was sent, too late to have reached Mr. Gorman who did not get it, advising him that there would be a postponement of the meeting to some later date, not fixed and not mentioned, and that, after being in Norfolk for five days, Mr. Bucholtz finally declined to see these people, through Mr. Baker. A. I think if you will look at that letter you will find that November 14th, as I have stated, was contingent.

Q. Contingent on what? A. On his ability to meet them.

The Court: That was the idea, without expressing any opinion, that the court had in mind in asking the question whether or not the defendant's attitude at the start was that this election was absolutely illegal and invalid and it would not recognize it and have any dealings under it, or whether its attitude was that those in authority on the Railroad did not have an opportunity, did not have time to see these men.

Mr. Donnally: I can only repeat what I said before that I understood that the management took the position all along that the certificate was void, that this System Federation was not the duly constituted representative of the men, but the management was willing to meet the gentlemen who wanted to talk with them about matters.

The Court: The thought that passed casually through my mind in that particular, Mr. Donnally, is that if you

considered that it was absolutely invalid and of no ef-
(202) fect, why continue from time to time the appointments to meet these people?

Mr. Donnally: It certainly would not have been courteous on the part of the management not to meet with its own employes, and when Mr. Preston requested an opportunity to talk with the management about matters, they prepared to meet him.

Mr. Mulholland: May I say just a word? I do not believe these gentlemen will take the position that they failed to meet the Committees because of lack of time, because we have met the officers of the Railroad in this City once, have met all of the group here—

The Court: (Interposing) Mr. Mulholland, I did not want to provoke any discussion. Probably Mr. Markham can aid me in this.

By the Court:

Q. If Mr. Bucholtz's other duties kept him so continuously engaged, was there not some one else, Mr. Baker or you, or some one whom he could have delegated to meet these men and deal with them or tell them you did not propose to deal with them under that election? A. My time, Judge, was about as much taken up during that period as Mr. Bucholtz's. I have various and sundry duties to look after and I am going from one point to the other. I am not in my office very often. Mr. Baker has never handled matters of this kind and, of course, he was not in a position.

Q. It was said yesterday—I don't know whether you will concede that to be a fact or not—that on one of these long visits when these representatives were down here, Mr. Bucholtz was in the City Saturday and Sunday. Was there no way he could have met these men briefly? A. The morning that they came, as I recall, they first—

Q. Sometimes we do not push the ox in the ditch, but we have to get it out if it has got in there itself? A. As I recall, the first meeting was called for Wednesday, November 14th, and Mr. Bucholtz could not keep the engagement. He was then out of the city. The men were advised, the representative of the employes were

advised. They came in again on the following Saturday. Mr. Bucholtz at that time was in conference. They came in about 11 o'clock, as I recall, and he was in conference at the time with other officials of the Railroad and he sent them word he could not see them, that he was engaged in this conference, and would not be able to see them. That was on a Saturday.

I was familiar, though with the demands on the part (203) of Mr. Gorman and the other members of the Committee to meet with Mr. Bucholtz. I was thoroughly familiar with that. I was advised of the meeting they were trying to arrange. That is exactly the meeting you are talking about, the meeting of the 14th of November. I said that was tentatively arranged. I knew that on (204) the 9th of November Mr. Bucholtz wrote a letter addressed to Mr. Belcher in which he said, "Regret very much that I shall have to postpone to a later date the meeting with the representatives of employes scheduled tentatively for November 14th at Norfolk. Conditions have arisen that make it impracticable to have the meeting on that day. Copy to National Mediation Board, Washington, D. C."

Q. That letter was written on the 9th and was addressed to Mr. Belcher at Princeton, West Virginia. The mails are not so fast between Norfolk and Princeton, are they? It takes a reasonable length of time, something more than twenty four hours to get a letter? A. Between Norfolk and Princeton.

I did not know that on the 12th a telegram was sent by Mr. Gorman, and not by Mr. Belcher, and I did not know Mr. Gorman was the man who had communicated originally with Mr. Bucholtz with a view of meeting him on the 14th of November. I never saw that telegram to which you have referred. I think that was replied to by Mr. Baker. That telegram said, "Accompanied by Committee we will meet you at your office on November 14th in order to lay before you what has happened on the Virginian Railroad, violations of the Railway Labor Act and understanding which we will have with you. This is very urgent. Leaving for Norfolk, Atlantic Hotel." That was dated on the 12th and that was two days prior

to the time tentatively fixed for the meeting on the 14th. Mr. Baker, assistant to the President, wired on the 13th as follows: "Your night letter to Mr. Bucholtz. Meeting referred to has been postponed and Mr. Belcher, Princeton, was notified." That telegram is addressed to Mr. Gorman. When these gentlemen finally got into the office. I don't know the date but it was on a Saturday as I recall, when the representatives of these Unions (205) came to his office Mr. Bucholtz was in town. The men did not come to the office on Monday, it was Saturday. They were first in there on the 17th. The first meeting was not on Wednesday.

I am familiar with the letter addressed to Mr. Preston under date of November 19, 1934, which says: "With further reference to Mr. Belcher's letter of September 21, 1934, requesting a conference with the Virginian Railway Company, which I understand you desire for the purpose of transferring the existing labor contract of the Mechanical Department Association to the Railway Employes Department of the American Federation of Labor. Under date of November 9 I advised Mr. Belcher at Princeton, West Virginia, of the postponement of the conference which had been tentatively arranged for November 14th. I understand from my office force that you have disregarded this request and have been in my office daily beginning November 14th, in spite of my advice to you that conditions were such as to prevent a conference at the present time. I have also been notified by representatives of the Mechanical Department Association of the Virginian Railway that a majority of our employes are not in favor of representation by the American Federation of Labor and have demanded the right to participate in any conference which may be held relating to labor agreement, claiming that there were irregularities in the election of August 20. Fair treatment requires that the representatives of the Mechanical Department Association of the Virginian Railway have an opportunity to have their rights in the matter properly considered and determined. It is impracticable for (206) me to set a definite date for a meeting until this and other matters in connection with the situation have been clarified. I am sending a copy of this letter to the National Mediation Board at Washington, D. C., in order that they may be fully advised of the situation."

I was not present when that letter was dictated. I saw a copy of it. I do not know whether that letter was put in the mail or not. I do not recall having heard Mr. Preston's testimony that it was handed to him in the office. If Mr. Preston said that I am not in a position to contradict it.

I am familiar with this statement known as Exhibit No. 1 on employe representation, signed by Mr. Sasser. I was in on the conference where it was arranged. Mr. Loyall helped prepare it. Mr. Bucholtz was not in the office. It was Mr. Loyall and Mr. Sasser and me, and that is all. All I know are those three. I could not tell you to what extent I assisted in the preparation of this pamphlet. It was all between the three of us. There were suggestions on the part of one and suggestions on the part of another one and revisions and changes and so forth; a draft drawn to begin with and then revised. I could not tell you how many times it was revised. It was finally passed on by our counsel as to whether or not we had a right to circulate it. The date of that pamphlet is July 11, 1934.

B. E. Nevins, a witness for defendant, testified as follows:

My name is B. E. Nevins. I am Master Mechanic for (207) the Eastern Division of the Virginian and my office is located at Victoria, Virginia. I have charge of Victoria, Roanoke, and Sewells Point. I live at Victoria. I recall an occasion when I talked to Mr. Nelson who testified yesterday. I do not recall whether it was during the early part of August, 1934. I cannot recall the dates, but I have talked to Nelson and he to me. I had a talk with Mr. Nelson shortly before the election that was held at Victoria on or about August 20, 1934, probably a week before the election. I have a son who lives right next door to Nelson and I was over there one evening and Nelson came to me and talked in behalf of his son-in-law, in connection with the Federation of Labor and in connection with the employment for his son-in-law. Substantially that conversation was that he said: "You know Asbury," that was his son-in-law's first name, "has finished his time as electrician apprentice

and now he is back home. I wish you would do something for him." "Well," I said, "You know the conditions around here as well as I do, Tom. I could not do anything for Asbury right now." He said, "You could put on a third shift." I said, "I could if the appropriation would permit it, but I have not got enough money to work the third shift. That is why we have taken it off." He said, "Now, you know Asbury joined the Federation of Labor up there at Mullens. He had to do that in order to stay there and I hope you won't hold that against him." I said, "Tom, that don't enter into my mind at all. That has got nothing to do with it."

That was all of our conversation at that time. I did (208) not say anything to Mr. Nelson on that occasion relative to which way his own interest lay in connection with labor organizations. I did not say anything to him at that time relative to any move to take the shops away from Victoria. That subject was not discussed on that occasion. That conversation took place at my son's place which is right next door to Tom Nelson's.

I remember an occasion a few days later than that, and before the election when I talked to Mr. Nelson. Tom stopped in at my house and he told me that it was rumored that if the Federation of Labor would win out here that our shops would be moved away and we would not have a job here. I said to him, "Tom, you know that has been town gossip here for the last three or four years and as to the shops being taken away from here, I could not tell you one way or the other." When I said "That has been town gossip for three or four years past," I meant it had been the general talk, not only in town but around the shops. It has been hinted occasionally that the shops would be moved away from Victoria. The talk to which I had reference did have connection with the American Federation of Labor to this extent, that it had been told to him or he felt that if the American Federation of Labor was to take charge there instead of the Independent matter, that the shops would be moved away, or at least he claimed that he had been told that. He did not tell me who had told him that. At the time of this conference that I have last (209) referred to, I did not say anything to Mr. Nelson relative to where his own interests lay in connection with membership in labor organizations. I did not advise

him to remain away from the American Federation of Labor. I am well acquainted with Mr. Nelson. I have been in Victoria 28 or 29 years and I have been knowing him ever since that time. At one time Mr. Nelson was a business man in town and I dealt with him. My relations with him have been very friendly.

I have employees that work in my office at Victoria, chief clerk, time-keeper, and a stenographer in the office. On occasions these employes do clerical work or typing work or work of that character for our own employes, not for outsiders. The custom in our office in the connection indicated is we very frequently have employes to get in financial difficulties and other troubles that they come to my office for a little advice or for a little letter writing, and we gladly do that. That has always been the custom. There is a Notary in my office. I know he very frequently performs notarial services for employes of the railroad in connection with their personal matters, or otherwise. I have never made any objection to that.

CROSS EXAMINATION

By Mr. Brandt:

I know Mr. Billmyer very well. He lives at Victoria. I was the Master Mechanic of the Virginian Railroad in 1922 at the time of the strike. At the time of the strike or just prior thereto, the Shop Crafts employed by the Road were members of Standard Unions. After the (210) strike the men employed were not members of the Unions but were members of the Mechanical Department Association. I think Mr. Billmyer was the Assistant Chairman of the Mechanical Department Association and he lived at that time in Victoria.

I really do not remember the circumstances under which the Mechanical Department Association was formed after the strike. I did not have anything to do with the getting up of that, but it was gotten up by the men because they wanted some way to make contact with their employer. I did not assist the men in bringing about that organization. I did not have any hand in that. Just what part some of my assistants took in it I don't know. I expect they did do such as writing the minutes and helping them prepare their contracts. As

to the men in my office, the stenographer by way of illustration aiding Mr. Billmyer in preparing a contract or draft minutes or any other paper that was requested. I don't know that that was done in my office, but I expect some of it was done there. Mr. Billmyer was a mechanic and as the head of this organization he lived there in Victoria. He maintained no separate office for his organization, he had no stenographer of his own. The organization had no separate office in Victoria. So, in the nature of things, not being equipped to do the work, they necessarily had to ask for the assistance of my assistants in preparing the requisite contracts and papers and I expect what writing was done we done it, but there was very little done. So far as I know, as far as keeping the organization intact and functioning, that (211) was a matter of having a meeting every two years to elect officers. To my knowledge there were not frequent meetings or anything of that kind and there were no payments of dues or anything of that kind by the members of this Mechanical Department Association. If they had any small expense I don't know that the railroad provided for it; I don't know how that was taken care of. That was testified by both Mr. Sasser and Mr. Markham that that was done. I understood it had been done.

I have recently heard of an association known as the Independent Shops Craft Association of the Virginian Railroad. I could not tell just when I first heard of it. It was within less than the past year. I do not know when or where that Association was formed. I do not know the heads of the Association or who is Chairman of the Association.

I do not know anything about a certification by the National Mediation Board of the American Federation of Labor as the representative of the men in the Mechanical Department of the Road. I do not know anything about the refusal to recognize System 40. That was not discussed with me in any way. That was a matter under the control of the higher officials of the railroad.

I do know that there was a shop craft union organized immediately after the 1922 strike, known as the Mechanical Department Association, and I have told you about that. I do not know that there was also another

union organized within the last year known as the Independent Shop Crafts Association of the Virginian Rail-
(212) road. I have heard talk of an Independent Shop Crafts Association. I absolutely never did authorize any of the men in my shop there at Victoria to circulate applications for membership amongst the men, because I had instructions from the Superintendent of Motive Power that that was none of my affair, that that belonged to the men, and I held a meeting of my Foremen and put the news to them in order that they would keep hands off. I don't know whether the men were permitted to circulate these applications during working hours and get signatures to them or not. I have never seen it done. But, if it has been testified to by a number of witnesses that it was done during working hours, I would not be in a position to deny it.

George R. Marshall, a witness for defendant, testified as follows:

Examined by Mr. Donnally:

My name is George R. Marshall. I am now employed as Chief Clerk to Mr. Nevins, the Master Mechanic at Victoria. The custom followed by me with reference to the doing of clerical work, typewriting, for employes, on matters not connected with railroad business is that we have always made it a practice to do that for employes only. If he has a letter he wants written, we always, if we have time, write them for him. Sometimes he will want a copy of it and we will make that for him. We always try to oblige them whenever our time will permit. We hardly ever inquire into the contents of
(213) papers that employes ask us to copy. That actual work is done in my office by the stenographer, who is under my direction.

Q. Do you recall any time towards the latter part of August, 1934, when Mr. Nelson came to your office? A. I do not, no, sir.

Q. Do you know of Mr. Nelson being in your office towards the latter part of August, 1934? A. Why, I could not say as to the exact time, I know he has been in there numbers of times.

I do not recall asking him to come to my office. I have never summoned him. I never sent any messenger to get Mr. Nelson to come to my office during the latter part of August, 1934.

John W. Waddell, a witness for defendant, testified as follows:

Examined by Mr. Donnally:

My name is John W. Waddell. My employment is pay roll clerk in Mr. Nevins' office. I was so employed in August, 1934. I am a Notary Public. My custom as a Notary with reference to taking acknowledgments and the like for employes of the Virginian Railway is that I have always taken any acknowledgment that they wished taken whenever they came in there and I had time. If the paper was too lengthy for me to read the Notary part of it over at that time, I told them to come back later. And I made no charge. I do not keep a record of those cases, as I do think I am required to do so under the law if I do not collect a fee for it.

I know Thos. Nelson who works for the Virginian Rail-
(214) way at Victoria. I do not recall taking any acknowledgment for Mr. Nelson during the month of August, 1934. I take too many acknowledgments every week to remember any one of them.

Clarence R. Billmyer, a witness for defendant, testified as follows:

Examined by Mr. Donnally:

My name is Clarence R. Billmyer. I am employed by the Virginian Railway Company as pipe fitter, sheet metal worker. I am not what is known as a lead man, or a foreman of the Virginian Railway Company. I was working for the Virginian in August, 1934. I have worked for that company off and on eighteen years, fifteen to eighteen years. I have never been a lead man or a foreman or acting foreman.

I was a member of the Mechanical Department Association. I don't remember when I became a member of

that organization; in the fall of 1922, but I just don't remember the month. I did at one time serve as an officer of that organization. It may have been in 1922, 1923, 1924, 1925, or 1926. I served as an officer on two or three different occasions. I held the office in the organization of Assistant Chairman for the Sheet Metal Workers, and I think I held that office on different occasions for two terms. I never did sever my connection with the Association. I was an active member of the Association.

I recall a meeting at Victoria in the early part of 1934 (215) at which persons were present urging the employes of the Virginian to become members of the American Federation of Labor. I don't recall what time of year that meeting was, but I imagine it was in early spring, several months prior to August. I do not recall all of them who were present at that meeting. I think at that particular meeting Mr. Gorman presided and there were some four or five men from Princeton. I think Mr. Munsey was one of them and a boilermaker by the name of Bailey, and I think we had a blacksmith from Princeton, and whether they had any others or not, I don't know. And it may be that there was an electrician of the C. & O. there, a little stout fellow; I don't recall whether he was there at that particular time or not. Mr. Munsey made a little impromptu speech in regard to the object of being there and said that they were trying to form a standard organization and that they were there in the interest of those organizations.

I was at Victoria during the early part of August, 1934, and throughout that month. I voted in an election conducted there during the month of August, 1934. As to the members of the election board conducting that election, I only knew Mr. Munsey personally. I did not know Mr. Bronson or Mr. Bentley. I had never seen them before. Mr. Munsey was present there when the voting was being taken. He sat at the table with the other two men. I did not say anything to any one at (216) that particular time regarding Mr. Munsey's presence on the election board and as observer. I was there to vote but I did make the remark that I did not think Munsey was a proper man to represent the Association on that Board. I made that remark to several of my co-workers and they said, "What are you going

to do about it?" And I said, "I don't know who can do anything about it or where to go." It happened that several fellows were passing around and we were all discussing it, and the question just hung fire. Subsequent to the election I did not take any action directed toward an inquiry into the character of the election. After the election I undertook to get statements from employes of the Virginian Railway relative to the election. I circulated a petition first amongst the men as a protest against Mr. Munsey acting in the capacity of an observer on the Electoral Board. I did not do anything else at that time. I circulated one petition and later on I may have circulated another one but it was in regard to forming our independent organization. I did take statements from employes relative to whether or not they had voted in that election. Those were affidavits. As near as I can recall I did take a statement from Mr. Thomas Nelson relative to whether or not he had voted. The affidavit was taken in the time-keeper's office. The time-keeper was Mr. Waddell. All of those affidavits that were signed were sworn to. I took affidavits from the employes of the Virginian as to whether they had voted because I saw a copy of the election return and I did not think from my knowledge of the men on the Virginian Railway that they had that many men that had (217) voted and I wanted to convince myself because the understanding that I had was that Victoria had gone practically around 98 percent for the American Federation of Labor. I got that understanding from rumors. There was no definite data but some of the men that I felt had voted for the American Federation of Labor thought that Victoria had gone practically solid, and I did not believe it, so I got these affidavits or had them written up to convince myself that Victoria did not go 98 percent for the American Federation of Labor. I don't remember whether at that time I had in mind the possible use of those affidavits in any other way than for my own information, but I also protested the election to the Mediation Board and I never received any reply to that protest and I had those affidavits so I just simply retained them. I suppose I had them a good while and finally a couple of men from Princeton came into the shop one day and stated that they also were protesting the election from that end and I never had

seen either one of the gentlemen before, and that in a way consolidated our efforts towards the forming of this independent organization, and then at a later date one of these gentlemen from Princeton was going to present his side to the Labor Board in person and I told him he could have these affidavits and use them in any way he saw fit. I got possibly thirty-five or forty affidavits there at Victoria. The gentlemen from Princeton who came to me were Mr. Hearne and a blacksmith, but I forget the blacksmith's name. I am not an American Federation of Labor man. I did solicit members for the (218) new Independent Shop Crafts Association at Victoria and I also came to Sewalls Point. I have been at Victoria with the Virginian off and on since 1910.

Cross Examination

By Mr. Brandt:

I am an officer of the Independent Shop Crafts Association. I am Secretary-Treasurer. I don't recall who is the President of that Association. I am the Secretary-Treasurer at the local point of Victoria; I do not mean the whole thing. I could not tell you who is the System Chairman of that Association.

By the Court:

Q. You said you were Secretary and Treasurer of some organization. What is it? A. Independent Shop Crafts Association at Victoria, Virginia.

Q. Is that the whole System? A. No, sir, that is just a local point.

Q. You said the whole System while ago, didn't you? A. I misunderstood the question if I made that statement.

Mr. E. G. Love is the head of that Association there at Victoria. I could not tell you when this Association was formed; I cannot remember dates. I took applications to form it. I did say awhile ago in answer to a (219) question put to me by Mr. Donnally that I circulated a petition to form this Independent Association in Victoria. I did that after the election of this American Federation of Labor. I voted in the election. The circumstances under which I voted were I walked into the

voting booth, was handed a ballot, marked it; folded it, and it was put back in the box. I voted secretly, and fairly. Nobody interfered with me in any way or suggested anything to me.

These two gentlemen that came from Princeton assisted me in organizing this Independent Association, or rather they organized it in Princeton first and I organized it in Victoria. One of them was Mr. Hearne.

I did not go to each man and ask him what he had to say and when he made his statement write it down. I had the affidavits all typewritten when I went to him, and all the affidavits that I got contained practically the same matter. I simply went in the shop and told the men that there was an affidavit on the Notary's desk, I don't know whether they left their work to go there to sign it; I did not see them go there. I said in response to Mr. Donnally's question that I went around to get the affidavits. I meant by that in passing along I would tell the men that there were affidavits and if they wanted to sign them they were at liberty to do so. I made no special effort to just go around and contact all of them, but I got thirty or forty affidavits altogether. I suppose (220) it took me three or four days, maybe five or six days, to get those thirty or forty affidavits. They were not printed; they were typewritten. I don't think I ever made any change in the typewritten affidavits which the men signed. I think each man signed the same kind of affidavit. I never looked at that. I simply had them written and put on the Notary's desk. The only blanks left in the affidavit were the date and the place for the man to sign. This Exhibit No. 18 is the form of affidavit, as near as I can recall. That is the paper that I circulated and asked them to sign. I placed them on Mr. Waddell's desk, the Notary, and the men went there and signed them as I went in and told them there was an affidavit for them to sign; that is what I told the men. And they went to the time-keeper's office and signed the affidavit. I suppose that was during working hours, during the day.

I was one of the officers of the old Mechanical Department Association of the Virginian Railway. I helped prepare the contract in 1922 between the railroad and its various craft employes. That was not drawn in Victoria. The contract was negotiated and signed in Roa-

noke. The contract was handed to us in typewritten form at a meeting of the System Board of Shop Crafts. I don't recall who handed it to us; I was not the Chairman. I did not sign that particular contract. I think we were there some four or five days negotiating that contract. The contract was written in the Hotel Roanoke. I don't know who dictated it to the stenographer, the tentative contract which was handed to us and which (221) we made some changes in. I don't remember who brought it to the Hotel Roanoke. At the Hotel Roanoke, representing the railroad at that time was Mr. Markham and if I mistake not Mr. Sasser was there. I would not be real sure, but I know Mr. Markham was there. No one of the lawyers of the railroad was there. Mr. Markham and Mr. Sasser were there. And Mr. F. W. Billmyer, Mr. Campbell, Mr. Dove, Mr. Sinclair, and Mr. Helvey were there also. I don't know whether Mr. Helvey is an officer of this Independent Shop Crafts Association and I don't know whether Mr. Campbell is an officer of that Association, that is the new one, the one that has been formed since the election of the American Federation of Labor. I do not recall the names of any of the officers of the System Association of the Independent Craft. I have some correspondence at home with the various names on it, but I don't recall the names. I do recall only the name of the President of the Local in Victoria. F. W. Billmyer is my brother. He is a member of the Independent Crafts Association. He does not hold any office. He lives in Victoria. He did not assist me in circulating the petition for getting members for the Independent Crafts Association.

Re-Direct Examination

The time-keeper's office at Victoria is located in the same building where the men work. The roundhouse and the machine shop are connected. You step right out of (222) the roundhouse and into the time-keeper's office.

The petition that I circulated after the election relating to the formation of the Independent Shop Crafts Association was for the formation of an organization to represent the interests of the employes that did not care to join the standard organization, and it was left to be worked out at a later date as to just what the name and

all would be. At the time it was circulated, it was primarily for our own division on the east end because we did not have any way of knowing just how the men on the west end would feel, so we were working it primarily for our own division.

Harvey C. Hearne, a witness for defendant, testified as follows:

Examined by Mr. Donnally:

My name is Harvey C. Hearne. I am an employe of the Virginian Railway Company in the Car Department at Princeton. I have been in the employ of the Virginian Railway since December, 1922, I believe. I am not an officer or foreman. I have held the office of Chairman of the Car Men for the Roanoke Division in the Mechanical Department Association. I don't know of any moneys collected by way of dues from members of that Association. I do not know of any salaries being paid to the officers of the Association. The officers of the Association were all company employes. The Association did (223) not pay any fees to organizers for getting members that I know of.

I do know Mr. Munsey. I was a member of the Association at the time Mr. Munsey was an officer of that Association. He held the office of Chairman of his craft, I think General System Chairman. I did not exactly know that Mr. Munsey was a member of the American Federation of Labor at the time he was Vice Chairman of the System organization; I heard that he was. What happened to make me think or to suspect he was a member of the American Federation of Labor was I attended some mass meetings in Princeton they had where all crafts were invited and he was acting Secretary of one or two of the meetings. I could not give you the dates of the meetings; it was prior to the election of August, 1934. I could not say how many months prior to that, exactly; they had so many there I don't know the dates of them. Mr. Munsey was acting Secretary of two meetings I was at. There were 175 or probably 200 men at those meetings. I suppose the object of the meetings was organizing American Federation of Labor. It was discussed in the meeting. I was satisfied up to the elec-

tion that Mr. Munsey should continue as an officer of the Association under the circumstances I have related. I was not satisfied at the election or afterwards. What caused me to feel dissatisfied with Mr. Munsey as an officer of the Association was I felt like he had joined the other organization and he seemed to be active in it. (224) He seemed to be active in the Federation.

I was present at the time of the election on August 16, 1934. I first learned that Mr. Munsey was on the Election Board and an observer at that election on the morning of the election from a Bulletin that was put up. Upon learning this, we talked it among our men and I went up later on in the election and the Mediator asked me if I was going to vote and I told him I was not. And he asked me the reason why and I told him I felt like it was an unfair Board and I did not want to vote. He asked me why I thought it was unfair and I told him Mr. Munsey was sitting on the Board and I did not think I was going to vote, I did not think any of my men were going to vote on that account. The Virginian management did not, as I know of, take any part in the policies or the selection of the officers in the old Association.

The circumstances in connection with the formation of the Independent Shop Crafts Association were that it was formed by me, petition circulated and presented to me and I don't know that I can give the wording of the petition, but for me to take necessary steps to protect the present organization, and we have no desire to affiliate with the American Federation. I could not give it exactly. They were a little bit different, some one way and some another. I could not tell you who circulated those petitions. There were about 500 signers on those petitions. Those petitions were addressed to me. After I received those petitions I started an organization. I called a meeting at Princeton sometime in November, 1934. Our Independent Shop Crafts Association (225) has something over 400 members. Dues are collected from the members of fifty cents for a mechanic and thirty cents for a helper or apprentice. As far as I know the members have pretty generally paid those dues; they do at our place. We have a secretary for each craft and the dues are paid to him for his craft and he turns them over to the General Secretary.

By Mr. Donnally:

I want to ask you if you have ever heard any statement made at a meeting after the passage of the amended Railway Labor Act relative to the main effect of that Act on labor organizations? A. I don't know exactly what you mean by that. It is quite complicated, I think. It is to me.

By Mr. Brandt:

Q. You don't know anything about the effect of the amendment of the Railway Labor Act, do you? A. I saw it. I could not quote it.

I made separate protests to the Mediation Board relative to the result of both the first and second election held at Princeton. The first protest was to holding the elections after a certain hour that evening, after sundown, I believe I put it, or something like that. The next protest was to the holding of the election in Princeton on the next day, that was on Monday, I believe. I protested the holding of the second election because I thought one was enough.

(226) Subsequent to those protests that I sent to Washington from Princeton Mr. Burton, our attorney, made further representations to the Mediation Board about this matter, and he and I went down to Washington. Mr. Burton was representing us and we went to Washington. He filed some papers with them, read the complaints. We showed them our petition. I asked them about the objection to the election, the protest. They said there had never been any filed with them and they knew nothing about it. I don't know whether Mr. Burton left with the Mediation Board any paper or not. I could not say. It occurs to me that he did. I am not positive whether Mr. Burton left anything there or not. We had some affidavits. I don't know whether he left them there with the Mediation Board or not. They got misplaced some way, if he did not. We showed those to the Mediation Board. I never did receive any communication from the Mediation Board relative to that protest.

CROSS EXAMINATION

By Mr. Mulholland:

I had met Mr. Donnally before today. I don't believe I do know his partner, Mr. Oliver. I don't know whether or not Oliver and Donnally are the representatives in a legal way of the Virginian Railway Company in Washington. When I appeared before the National Mediation Board in Washington with Mr. Burton, Mr. Donnally there, the man who just examined me on direct examination, was there. How he happened to be there, he and (227) Mr. Burton went down together. That is my attorney representing my organization, and Mr. Donnally, the attorney for the Virginian Railway Company, went there together with me.

This Independent Shop Crafts Association was organized in December. We adopted our constitution in December. I have before me what purports to be a constitution and by laws of the Independent Shop Crafts Association as amended November 22, 1934. We did not adopt a constitution and by-laws at that time. The meeting at which our organization was perfected was at Princeton. We had several meetings. I think it was adopted in December, 1934. We adopted a constitution and by-laws in December at Princeton. We elected officers at the Princeton meeting in December. And we elected the officers in accordance with the constitution and by-laws we had adopted. That was a new constitution and by-laws adopted especially for this Independent organization and officers were elected as officers of the new organization.

Q. How did you happen to be Chairman? Were you elected? A. I was elected.

Q. At a regular bi-ennial election? A. Yes, sir.

Q. When did your term expire as General Chairman? A. Which do you mean?

Q. Your last term as Chairman of the Mechanical Department Association? A. Well, you hold for two years.

Q. Well, when did your term expire? A. I don't know when that election was.

Q. Has it expired yet? A. I believe it has.

Q. You were elected in 1933, weren't you? A. Yes, sir.

Q. In what month? A. I believe the election was held in October, if I am not mistaken.

Q. In October, 1933? A. Yes, sir.

Q. Then your term would expire in October, 1935? (228) A. That is correct.

I don't know when I became a member of the Independent Shop Crafts Association. I was a member of it at the time the constitution was adopted at the Princeton meeting. I was at that same time serving as Chair (229) man of the Mechanical Department Association, and I was at that time elected General Chairman of the Independent Shop Crafts Association. I could not tell you whether I am still Chairman of both organizations, I could not tell you how that is.

Q. What I am driving at is why did you criticize one men for joining the American Federation of Labor while he was a member of the Mechanical Department Association while you did exactly the same thing; you went into an organization, as I understand it, that did not want the American Federation of Labor and he went into one that did. What is the difference? I would like for you to tell the court frankly what your position is? A. I don't know what the difference is.

Q. The fact is they are about the same, aren't they? A. If you want to put it that way, that is all right with me.

Q. Are you still an officer of that Independent organization? A. I am.

Q. The Independent organization, the new organization? A. There are so many associations, the Shop Crafts Association, Independent Shop Crafts Association is the organization we have now.

Q. You are an officer of that Association? A. I am.

Q. You are a car man? A. I am.

Q. During the last six months how much of the time have you worked at your trade? A. I could not tell you.

Q. You have been a great deal of the time in the Superintendent of Motive Power's office, haven't you? A. I have been in it.

Q. You have been in it almost ever since, haven't you? A. I have been.

Q. Is not it a fact that you spend a great of the time

there in preparing for the work of this Independent Shop Crafts Association? A. I do not.

Q. Were any papers prepared there incident to its work and organization? A. It was not.

Q. You are sure of that? A. I am.

The company allowed us to put up one Bulletin, I (230) think. I don't recall whether that was the Bulletin of October 1, 1934. The paper you show me I think is a copy of the Bulletin to which I refer. I believe that was posted on the Railway Company's Bulletin Board and that was after the National Mediation Board had designated System No. 40 as the representative of the men.

Mr. Mulholland: I want to read this Bulletin:

"Princeton, West Virginia,

October 1, 1934.

"TO WHOM IT MAY CONCERN:

We understand that the American Federation of Labor has offered to accept the present contract that the Virginian Shop employes have with the Company. The Mechanical Department Association made this agreement with the Virginian Railway Company and has worked under it for twelve years. I believe it is superior to any contract on the roads affiliated with the American (231) Federation of Labor and we have a better working conditions in our shops. Therefore, we see no reason why we should pay $5 to join the American Federation of Labor and pay heavy dues each month and to be subject to assessments to maintain a contract which they had no part in making. Surely the Virginian Shop employes will not permit a few with selfish motives to lead them back into a condition that caused many to lose their homes and everything they had and a condition which caused discord amongst ourselves as well as unpleasant relations with our company. Every thinking man should rebel against the unfair methods used by the American Federation of Labor in the recent elections held on the Virginian. The majority of the car men at

Princeton have pledged themselves not to affiliate with the American Federation of Labor. We have no desire to have outside men handling our affairs.

Respectfully,

(Signed) H. C. HEARNE,
General Chairman,
Carmen, Mechanical
Department Association."

On October 1, 1934, I was acting as General Chairman for the Mechanical Department Association. I think it was in November or December that I first joined the Independent Shop Crafts Association. It was something like a month or two following the date the Bulletin (232) was posted. I never did circulate the petition for the formation of the new organization. I did not draft it. I did not draft the notice that was sent out. When I first did anything towards the organization of the Independent Association was when I received these petitions. I got them all along after sometime the first of December. It may have been a little bit earlier than that.

Coming back to the election at Princeton I did not finally cast a ballot. I took no part in the election at all except to make a protest. I did not try to keep any of my men from voting, any of the Carmen. I certainly did speak to them about it. I did not ask them to stay away from the polls. I said to them we were having an unfair election and I was not going to vote and they said if I did not vote they would not. I figured what was unfair about the election was the man who was appointed to represent the Association. He was supposed to be simply a silent observer. I could not tell you whether he took any part in the election. I cannot give the court any information of any interference in the counting of votes or the casting of votes or the interference of the rights of any man who went there to express his choice. So far as I know I think every man had a right to vote secretly and freely.

By the Court:

Q. You spoke of having an attorney, Mr. Burton, to (233) go with you to Washington. What services did

he perform and how long was he employed by you? A. In going to Washington?

Q. In connection with the protest that you say you filed with respect to those elections held in August? A. In Washington, you mean?

Q. I mean altogether, in West Virginia and in Washington? A. He is still with us.

Q. What services did he perform with respect to that election? A. None with the election.

Q. He went to Washington? A. Yes, he read some papers there. I do not think he filed it.

Q. By whom was he employed? A. By the Independent Shop Crafts.

Re-Direct Examination

Q. Mr. Hearne, is that old Mechanical Department Association now in existence? A. I would not think so. We are using the contract.

Q. Why do you think it for the best interests of the employes of the Virginian to formulate the Independent Shop Crafts Association? A. I done it because there was a petition made to protect the organization.

Q. To protect what organization? A. The present (234) organization they have—

Q. Why did you form a new organization instead of changing the officers in the old? A. We had a split in the old organization. The entire lot of them thought it would be better to perfect a new organization and decided to change the name and go on and use the present contract until we got another contract.

Q. What proportion, if you can tell us, of the members of the Independent Shop Crafts Association were formerly members of the Mechanical Department Association? A. That is a question that I don't know whether I can answer or not. That seems to be pretty much complicated who was a member of the old Association. I suppose everybody was a member as far as I know. That is the way I felt about it. I could not answer that part of it.

Re-Cross Examination

In a way I am just about as hazy as the other men as to how I ever became a member of the Mechanical Department Association. We had a contract and by-laws

that specified special crafts and it is my understanding that every man who was a member of those crafts by that fact became a member of the Mechanical Department Association. So far as I know I never signed any application any more than any other man. My partici-
(235) pation was to vote in the bi-ennial elections. Awhile ago I spoke of the fact that we would form this Independent Shop Crafts organization to take over and continue the old contract that was made with the Mechanical Department Association. We did do that. Our Association is now operating under the agreement that was made with the Mechanical Department Association in 1922. I could not tell you whether our organization is now being recognized by the officers of the Railroad Company as the parties to that contract. I have not had occasion as Chairman to take up any of the matters involved in that contract with our officers since the formation of the new organization. But I understand we are operating and have taken over this contract. That is the contract that was made with the Mechanical Department Association in 1922.

By the Court:

Q. Mr. Hearne, the court is anxious to get all the information it can on this subject. You say that you protested, before or after, or possibly both times, the election held in August, and that you did not vote because of Mr. Munsey's affiliation with the American Federation of Labor in addition to having theretofore affiliated with the other organization. Do you know of any act or anything that Mr. Munsey did in connection with that election that you considered unfair or dishonest or
(236) fraudulent? A. No, I do not.

Q. Have you heard any charge made against him? A. I have not. That is all I heard, just his activities in both organizations.

Q. His membership in both organizations? A. That is right.

Q. But, has any act come to your knowledge that you considered unfair, dishonest, or fraudulent? A. No.

Q. Have you heard any specific charge made against his conduct in any way at all on that election? A. I have not.

Q. If you have, I want to know it. A. I have not heard a thing. I do not know a thing.

Mr. Donnally: I want to make a two-minute statement about the occasion of my appearance before the Board. In some way, I don't know just how, the Virginian got word that some Independent group from Princeton was coming down to appear before the Board and I requested, I think it was my senior partner, requested that we have an opportunity to be there at the time these gentlemen appeared before the Board, in order that we might be informed, representing the Virginian management, as to what their intentions were. This Independent group and the Board permitted me to sit on the side and listen to the representations made by the
(237) representatives of one of the factions of their employes.

By the Court:

Q. Who was the Treasurer of the Independent Shop Crafts Association? A. We had an assistant Treasurer.

Q. Who was the assistant Treasurer? A. Mr. Hudson.

Q. Where does he live? A. Princeton.

Q. Does he have in his possession funds to pay these different expenses? A. He has.

Q. How are they raised? A. Well, he can raise them by assessments, if we do not have enough in the treasury from dues.

Q. Did you raise funds by assessment? A. We have not had any assessments yet.

Q. Any dues? A. We have dues.

Q. Have the dues been paid? A. They have.

Q. What are the dues? A. Fifty cents for a mechanic, thirty cents for a helper or apprentice.

Q. I am referring to the new organization? A. Yes, sir, that is correct.

Ernest McKinley Forbes, a witness for the defend-
(238) ant, testified as follows:

Examined by Mr. Hall:

My name is Ernest McKinley Forbes. I am employed by the Virginian Railway Company and have been em-

ployed by them thirteen years. My position with the company is Car Foreman at Elmore, West Virginia.

The paper in the form of a petition that Mr. Mazingo testified on yesterday he saw me have at Elmore was a petition sent to Elmore by Mr. Tucker. Mr. Tucker brought the paper and delivered it to me and I in turn took the paper and pasted it in the Bulletin Board where all the men could see it. I did not deliver the paper to any individual or circulate it in any way. The next time I saw the paper was a bunch of the men gathered up on the shop track and asked me to explain what it was. They had the original copy of it that had been sent from Princeton and I took the paper and read the heading and at that time there was some seven or eight men signed it. I did not ask them to sign it at all. They all signed it of their own free will and accord. I told them they could sign or not sign either one they wished, that there was nothing compulsory about it. The instructions I had in respect to influencing the men in connection with their labor affiliations was I had instructions not to have anything to do with it, whatever. I carried out these instructions. Mr. Hearne came back to Elmore and got the paper that these men presented to me on the shop track. (239) Mr. Tucker whom I have mentioned, lives at Princeton.

By saying I put it on the Bulletin Board I mean the Bulletin Board is the place where if we have Bulletins to post we put them up in the Bulletin Board. It has got glass over it and they get instructions and line-ups. It is used for company business. That is the way we impart information to the employes. It was put there where everybody could see it and do as they wanted. The employes post notices on that board also; notices of meetings and other things. There is no restriction imposed on employes about posting notices or anything of that kind.

CROSS EXAMINATION

By Mr. Brandt:

The Mr. Tucker that I mentioned is car repair helper at Princeton. My headquarters are at Elmore. I am Car Foreman there. There are forty-two men under me. I do not employ them. I make the arrangements for their employment. They are under my immediate supervision

and control while they are at work and I give them their orders and instructions.

The paper that I am talking about was a paper brought up, I don't remember the wording of it, but the meaning of it was simply this: Those that were satisfied with the present way of handling the organization could sign it and express their feelings by signing it, or not signing. If they did sign it they would express their feelings as (240) being satisfied with the present organization by which I mean the Mechanical Department Association. I posted that on the Bulletin Board and the men did not understand it, so I explained it to them. If they did not sign it that meant, of course, they were dissatisfied with that present organization.

John W. Sasser, a witness for the defendant, testified as follows:

Examined by Mr. Hall:

I stated that I was Superintendent of Motive Power and have been Superintendent of Motive Power going on fifteen years. As such Superintendent of Motive Power I am the head of the Mechanical Department of the Virginian Railway. My office is located at Princeton. Our main shops are located at Princeton. Since the main line Roanoke Division was electrified, there has been a change in the operation of trains on that division. Prior to the electrification Princeton was a terminal and we operated our trains by steam from Princeton to Roanoke and from Princeton to Elmore; in other words, it was a division point. While that system of operation was in effect most of the running repairs were taken care of in Princeton. Since electrification those running repairs are done at Elmore and Mullens, West Virginia, and at Roanoke. The general character of the work done in the shops at Princeton right at this time is that Princeton is prac- (241) tically a manufacturing point. In other words, we take care of classified repairs. There are 322 men employed in the Princeton shops who work in that class of work. That is the total number of employes at the Princeton shops. Since electrification went into effect in 1926 there is only one man of that 322 that is engaged in running repairs at Princeton at this time. We have one switch engine that has to be maintained at

Princeton and this man takes care of repairs on this switch engine. We have a force there of the Car Department, twenty men, who work on running repairs. They are not included in the 322 so that of the 322 men that work in the back shop, only one of them has any connection or anything to do with running repairs.

I will explain in a little more detail the work that is done on railroad equipment in this main shop which I call the back shop. Princeton shop at this time does practically no running repairs, or very little running repairs, and the bulk of the work taken care of in Princeton is classified repairs, and store order work. All of these 322 men, less one, are engaged in what I call classified repairs and store order work. What I mean by classified repairs is that classified repairs are heavy repairs on locomotives and cars such as rebuilding and putting them in shape to go long months of service. When that class of work is done the engine and cars are withdrawn from service. They have no connection with the transportation and are not being used; they are out of use. When a locomotive is taken out of service for (242) classified repairs it usually takes an average of around 105 days out of service. I don't know exactly the average of the cars but they will average more than 109 days. Some types of that work has been done by others than the Virginian shop at Princeton; the Virginian Bridge and Iron Works which is a company located at Roanoke, have rebuilt a great many of our cars. That company has not any connection with the Virginian Railway at all.

Q. Could these engines that are rebuilt or worked (243) over in the Princeton shops be sent to the Baldwin Locomotive Works or to the Richmond Locomotive Works, or any concern of that character to have the same work done?

Mr. Brandt: I object to what could be done.

A. We have had work done like that by the Baldwin Locomotive Works.

The Court: How is that material, Mr. Hall, if they could or could not be sent to them?

Mr. Hall: The materiality of it, your Honor, is to show that it is just manufacturing work. Companies not connected with the Railroad Company at all can do that kind of work.

Mr. Brandt: They build cars, too, don't they, and the railroads use them afterwards?

The Court: I assume it is all in your effort to show that some of these employees are not engaged in interstate commerce.

A. (Continuing) As I have stated, we have sent engines to Baldwin Locomotive Works to have some of the work done.

Mr. Brandt: I don't want to be making objections all the time, but it does seem to me that the Supreme Court of the United States has settled that question at least fifty times. I don't think that is a proper matter of inquiry here. There were some employees who may today be working on a car where their work may be confined purely to what may be characterized as intrastate, and tomorrow their work may be of a different character.

The Court: This Court may not render the final decision in this case, and you had better let the record go up once for all and let your objections appear.

By Mr. Hall:

Q. I will ask you this question: Do those employes there in the back shop that you have named, 322 less one, work exclusively in what you designate as manufacturing work or classified repairs?

Mr. Brandt: That is certainly leading.

A. The bulk of the work they do is classified repairs, that is, both in the car department and the locomotive department.

By the Court:

Q. What percentage of your freight that this railroad handles is carried in interstate commerce, Mr. Sasser, do you know? A. I don't know, Judge.

By Mr. Hall:

Q. What type of work other than classified repairs is done in these shops, the back shops? A. Well, we do a (244) great deal of store work, manufacturing material to be placed back in the stores to be issued out at different points on the railroad, such as making rivets and manufacturing practically all the repair parts for outlying points. Instead of buying them we can manufacture them cheaper than we can buy them and we do that class of work.

Q. But you could buy those things on the market instead of manufacturing them? A. We do buy a great deal of that on the market where we can buy it cheaper.

I was Superintendent of Motive Power when the Me- (245) chanical Department Association was formed in October, 1922. It is my understanding that that Association applies strictly to the employes in the Mechanical Department, which is under my supervision. Neither I nor anybody else in the employ of the Railroad Company, so far as I know, had any connection with the organization of that Association. The men met and made their own organization and submitted their contract.

There has been referred to in the testimony when I was on the stand before a statement that was issued July 11, 1934. I had during the month of January, I think, issued a previous Bulletin in connection with their labor affiliations, I mean in line with this pamphlet that I referred to. The Bulletin you hand me is the one I have reference to, and it is filed as Defendant's Exhibit S.

That Bulletin was sent out to be posted at the divisional points and where Bulletins of the Mechanical Department are ordinarily posted. I did not see it personally on all Bulletin Boards, but I know personally it was sent to the points that have Bulletin Boards.

Mr. Hall: It is the Bulletin of January 20, 1934, and reads: "Reports have and are being widely circulated to the effect that the law or the Federal Coordinator of Transportation has outlawed labor organizations or associations of employes where membership and represen- (246) tations are confined to the employes of a single railroad or system. Such reports are without founda-

tion or justification because such organizations are not outlawed by any statute. All the labor organizations and associations at this time representing employes in their dealings with the company are duly designated and authorized to represent employes in accordance with the requirements of the law. Federal statutes provide that all employees are free to join or not to join any labor organization or association and will not be penalized, disciplined or prejudiced in any way by this company. All employes have the right, without interference, influence or coercion to designate their representation by such means of collective action as they may see fit. No person, whether an officer or employe of the company or one not in the service has the right to influence, interfere with, or coerce any employe in his choice to continue or to surrender his connection with, or to join or not to join any such organization or association. (Signed) James W. Sasser, Superintendent of Motive Power."

What caused me to issue that Bulletin was the employes, a good many of them, asked me questions as to their right to remain in the organization of which they were members. They advised that they had been approached by agents of the American Federation of Labor (247) and had been advised that they would be forced to become members of the American Federation of Labor, and that is the main reason for issuing that Bulletin. Some of the employes requested me to issue a Bulletin stating what my understanding of the law was in regard to their labor affiliations; they asked me to let the men know just where they stood, and that was one cause of issuing that Bulletin. That was about the same reason for issuing the statement of July 11, 1934; I was approached by different employes requesting that we give them something to show where they stood.

I testified the other day that before issuing that statement I submitted it to Mr. Bucholtz, the President, and went over it with him. I report to him and I would not issue any important statement or anything like that without consulting him. I also said that the General Solicitor, Mr. Loyall, passed on the statement. It was submitted to him because we did not care to get out anything in violation of the law and we wanted to be sure there was nothing in that circular that was in violation of the law. Other railroads have issued similar statements. I think

the Central of Georgia and the Norfolk & Western issued similar statements.

Just prior to the first election that was held at Princeton, on August 16, 1934, there was a Bulletin issued and posted in regard to the provisions of the Amended Railway Labor law. Mr. Bronson, the Mediator, prepared that Bulletin or furnished it to me to be issued and posted. That is dated August 14, 1934. Mr. Bronson had that typewritten and furnished it to me to be signed and put (248) on the Bulletin Boards and I posted that according to his instructions. Said Bulletin is filed as Defendant's Exhibit T.

Later, that same Bulletin was issued under the direction of the Mediation Board in a different form. I don't think the typewritten Bulletin that Mr. Bronson furnished me to issue covers the entire wording of the blue print Bulletin bearing the same date, but only part of it, but it was issued before the blue print. This blue print which you refer to as Exhibit U, was later issued and posted at all points where we have Bulletin Boards. The blue print Bulletin is filed as Defendant's Exhibit U.

In connection with the August 16th election, I issued a Bulletin in regard to the men voting, at the request of Mr. Bronson, the Mediator. The Bulletin which you show me, dated August 16, 1934, signed by me as Superintendent of Motive Power addressed to Mr. Tender and Mr. Halstead was put on the Bulletin Boards at the request of Mr. Bronson. It was not just delivered to those gentlemen as instructions in regard to the men voting. Said Bulletin is filed as Defendant's Exhibit V.

There was introduced while I was on the stand before a contract which I had signed with reference to posting the notices or Bulletin in regard to giving the eligible employes an opportunity to vote. I posted that notice (249) in accordance with that contract that Mr. Bronson asked me to sign on the Bulletin Boards so the employes could have access to it. The Bulletin dated August 18, 1934, which you show me is the Bulletin that was posted in connection with the second election, to be held on August 20, 1934. Said Bulletin is filed as Defendant's Exhibit W.

I did not sign the second contract or the rules providing for the second election in Princeton. That was submitted to me for my signature by Mr. Bentley and Mr. Bronson. I never thought it was fair to hold a second

election. So far as I knew there was no interference in the first election and that is the reason why I did not sign it.

In connection with the first election, Mr. Munsey said I was around the polls, or voting places, during the time men were voting. Mr. Bentley and Mr. Bronson had asked me to assist them in arranging for this election. They wanted to get over the railroad and wind this election up as quick as possible. I did go around the polls during working hours to handle business with Mr. Bronson, but I did not remain in the voting room at the time that the men were voting. On one occasion while I was in the place they were voting, one of the employes came in to vote, and I immediately went out before this employe voted. I did not stay around or interfere with the men at all. Mr. Bronson asked me to arrange for the voting boxes and places for them to vote, booths, so they could vote secretly, stationery and pencils and different things, tables and chairs to use in connection (250) with this election. He did make a request of me in the first election as to having the men sent in by their Foremen or Superintendent. It was decided that we would send the men in the different departments in the same as we pay the men off. Instead of stopping the whole shops and throwing all the men away from their work during working hours, it was decided to vote these men the same as we do when we pay them off by voting the different departments one at a time.

I stated that I did sign the rules for the first election which was held at Princeton on August 16th. Those rules were gotten up, I think, by Mr. Bronson in Norfolk. Mr. Munsey was not present when those rules were gotten up. As I understand it, his action showed that Mr. Bentley represented him in that connection. What gave me that understanding was on different occasions when I would address Mr. Munsey on the line of road at the different meetings, Mr. Bentley would object to it and very often would answer the questions himself. What occurred at this particular conference in August at Norfolk when these rules to govern the election were made up and signed with reference to the representation of Mr. Munsey, he not being present, was we objected to Mr. Munsey representing the Association, those whom we had a contract with at that time, and Mr. Bronson thought we were right in objecting to

Mr. Munsey remaining on that Board. However, he called up Mr. Cook, Secretary of the Labor Board, who agreed to allow Mr. Munsey to remain on this Board. (251) Mr. Bentley made the statement in regard to being authorized to represent Mr. Munsey in that conference, that he had called up someone in Princeton, I don't know—I think he named the person he called up—and he had been told that they wanted Mr. Munsey to represent them.

By the Court:

Q. Mr. Sasser, were any of the men who were entitled to vote in this election, so far as you know, denied the opportunity to vote? A. No, sir.

Q. So far as you know, all had the opportunity to vote if they wished to? A. All employes had an opportunity to vote, who wanted to vote, as far as we are concerned.

Q. I mean, you do not know of any interference by anyone? A. No, sir.

Mr. Munsey made a statement in reference to a petition that was presented to me in regard to giving the men forty hours per week. I don't believe they completed that petition. There was a petition started around through the shops to get signatures from the men to ask for forty hours a week. We heard about it and sent for Mr. Munsey, the foreman, and the Committee, to talk it over with them, and I explained to Mr. Munsey that it would be necessary if we granted the forty hours a week to reduce the force accordingly; in other words, we had an appropriation to work under (252) and we would be forced to cut the force to justify us in giving forty hours a week to those that remained in the service. I explained to Mr. Munsey just what I meant and I thought they should withdraw that petition rather than cut this number of men out of the service, and Mr. Munsey left my office with Mr. Foster and the others, and I think went down to the shop superintendent's office and in a discussion down there they decided that rather than cut the force they would handle it with Mr. Eastman as it was understood that Mr. Eastman's suggestion was that we would have to or be forced to maintain the force on a certain day of that year, and they would get a decision from Mr. Eastman before they

went any further with it. Mr. Munsey either wrote or wired Mr. Eastman. I never saw a copy of his letter or telegram, but I have a copy of Mr. Eastman's reply. After that reply was received, the matter of the petition was dropped. With our limited appropriation, we could not have given the men forty hours per week as provided by their contract. Our earnings were low. We had so much to spend on that, and we worked the men just as long as the money would last, and then shut the shops down. We worked the men five days a week as long as we worked, but when the money gave out we closed up. That would have given the seniority men an advantage over the other employes. In making that reduction we would have cut the men off in accordance with their seniority on the list; the senior men would remain in service and the younger men cut off. That was explained (253) to Mr. Munsey when he came in for that conference. The committeemen were up on the seniority list far enough to remain in the service and they would not have been cut off but would have continued to work, so it would have been to their advantage but to the disadvantage of the others.

I think it was Mr. Munsey who said that he had been required to sign some kind of application when he applied for work on the Virginian in which something was set forth about affiliations with labor organizations. We have no such application. We have no application that has anything to say about American Federation of Labor on it. I have never had since I have been Superintendent of Motive Power any application that the men have been required to sign when they applied for a job, in which anything is said about affiliations with labor organizations, American Federation of Labor, or any other organization. The form of application for employment on the Virginian Railroad which you show me is the form that has been in existence ever since I have been Superintendent of Motive Power. All applicants for positions in my department are required to sign that form. There is no other or additional form of application that has ever been required of them. Said form is filed as Defendant's Exhibit X.

Q. Mr. Wyatt, who is a car dumper down at the piers, testified something about having made some complaints with reference to the Mechanical Department work.

What department does Mr. Wyatt belong to? A. It is (254) my understanding Mr. Wyatt reports to the Transportation Department; Mr. Maston has charge of the coal pier down there, and Mr. Cunningham.

Q. Has your department, the Mechanical Department, anything to do with those men who run the dumpers at the pier? A. No.

I heard, at the time they were being circulated, about these petitions in regard to not wanting to affiliate with the American Federation of Labor that were sent to Mr. Forbes at Elmore. I did not have any connection with sending them down there, nor did I authorize Mr. Forbes to have anything to do with them. The instructions I had given Mr. Forbes in regard to those matters that related to labor affiliations were that we got out several Bulletins and where I would come in contact with the foremen I would advise them to stay away from it and have nothing to do with it. As to the custom of putting things in the Bulletin Boards around at the different points by the employes, I think there is such a custom at Elmore. It seems in this case that Hearne gave a car repair helper by the name of Tucker this paper to be carried over to the men.

Q. You don't know that, Mr. Sasser, but all I am asking you is whether or not it is customary for the men themselves to put things in the Bulletin Board? A. The Bulletin Board is put up for the purpose of putting information before the men on Company business and we allow those we have a contract with to use that Bulletin (255) Board.

CROSS EXAMINATION

By Mr. Mulholland:

I have identified Exhibit S as a Bulletin that I posted in the shops at Princeton and other points. I said that that Bulletin was posted because a great many men had come to me and wanted some explanation of their rights. I think it was November or December, 1933, when those men first came to me and asked me to prepare such a Bulletin. And in the light of their desire to have their rights explained, I prepared the Bulletin and posted it as an expression from the company based upon the in-

formation that I had. I prepared that Bulletin in my office. It is the language that was gotten from certain information, part of it, and part of it is my own language. It was solely because of the attitude of the men that I wrote the Bulletin; I wanted to set the men straight as near as possible. I don't know with what regional board the Virginian is affiliated under the amended Railway Transportation Act. I think we are with the Eastern Region. I do not know who is the Chairman of the Eastern Regional Committee. I don't remember whether in January, 1934, Mr. Eastman, the Coordinator of Transportation, ordered the Railroads to publish and post some Bulletins in reference to the rights of the men. I still say to the court that I prepared this Bulletin because the men wanted some information. I do not remember this particular letter you show me from Mr. M. C. Kennedy of the Eastern Regional Coordination Com-
(256) mittee, addressed to Mr. Eastman under date of January 9, 1934, and which was sent to all railroad companies. We had a great deal from those committees. I am not on the mailing list of Mr. Eastman. Our President gets those things, and usually conveys it to the officers. This particular letter which you show me as you say simply to refresh my recollection reads:

"New York, New York, January 5, 1934.

"Hon. Joseph B. Eastman,
Federal Coordinator of Transportation,
Washington, D. C.

Dear Mr. Coordinator:

"The Eastern Regional Coordination Committee at a meeting held in Washington on January 4, 1934, had before it for consideration your communications of December 7 and 19, 1933, having to do with employ organizations. While this Committee is advised by counsel, as I stated to you in my letter of December 15, that it has no jurisdiction over questions of this character as a Coordination Committee it desires nevertheless to cooperate with you to the extent of its ability. It was therefore decided that its members should recommend to the Eastern President's conference that a notice similar in character to the attached be posted for the in-

formation of all employes. The Committee further determined that it would undertake on its own initiative an investigation to determine whether the arrangements now in effect on the railroads in the Eastern Region respecting Employe Organizations involve waste or preventable expense or otherwise afford an opportunity for action (257) by the Committee in furtherance of the provisions of the Emergency Transportation Act of 1933.

"Yours very truly,

Signed M. C. KENNEDY."

The notice attached to this letter, dated January 5, that they are recommending to the affiliated railroads to be posted is possibly in exactly the same language as my notice posted on January 20. That letter and notice does not refresh my recollection that I posted that at the order of the Regional Committee rather than at the request of the men. That was the request of the men. We had dissatisfaction for possibly two months before that Bulletin was put up. I did tell the court just a few minutes ago that because of the solicitation of our employes I prepared this document in my own language and from the information that we had in our office.

By Mr. Mulholland:

Q. Now, Mr. Sasser, calling your attention to this, don't you admit you are mistaken in that testimony you gave awhile ago, comparing these two documents? A. Didn't you understand me to say that this was prepared from the information we had in the office?

Q. I understood you, Mr. Sasser, that you said, and I want to be perfectly fair with you about it, that upon the complaint of the men and from the information you had you prepared the document in your own language, or at least a part in your own language. Now, the court heard (258) it. I want you to be fair as to whether you are mistaken or whether you told the truth? A. Suppose you read that part of my answer there.

Q. I do not need to. A. Yes, sir, as I remember my answer it was I did prepare this from my own memory and the information we had at the office.

Q. Now, do you admit now that you posted the notice that you were ordered to post by your Coordinating Committee? A. We used some of the language they

gave to prepare that. That was information we had in the office at that time.

Mr. Mulholland: In order that it may be in the record I am going to read the notices that the comparison may be made by the court. I am reading now the notice attached to the letter of the Eastern Regional Coordinating Committee addressed to the Hon. Joseph B. Eastman, Federal Coordinator of Transportation, February 5, 1934:

"Reports have and are now being widely circulated to the effect that the law or the Federal Coordinator of Transportation has outlawed labor organizations or associations of employes whose membership and representatives are confined to the employes of a single railroad company or system. Such reports are without foundation or justification because such organizations are not outlawed by the statute.

All the labor organizations and associations at this (259) time representing employes in their dealings with this company are duly designated and authorized to represent employes in accordance with the requirements of the law.

Federal statutes provide that all employes are free to join or not to join any labor organization or association and will not be penalized, disciplined or prejudiced in any way by this company.

"All employes have the right without interference, influence, or coercion to designate their own representatives by such means of collective action as they may see fit. No person whether an officer or employe of this company, or one not in the service has the right to influence, interfere with, or coerce any employe in his choice to continue or to surrender his connection with, or to join or not to join any such organization or association."

I don't remember whether that was issued prior to the announcement of the amendments to the Railway Labor Act and was issued under the provisions of the Emergency Transportation Act of 1933, or not.

I have introduced another document here as Exhibit T. That notice was published and posted at the suggestion of Mr. Bronson, representing the National Mediation Board. I am partly familiar with the provisions of

(260) the Railway Labor Act as amended June 21, 1934. I have read Section 8 providing that every carrier shall notify its employes by printed notice in such form and posted at such times and places as shall be specified by the Mediation Board and that that notice must include the printing in large type, the third, fourth, and fifth paragraphs of that section. The blue print that I have introduced here as Exhibit U was posted by order of the President of the Railroad. I do know that our railway was ordered, as all other railroads were, by the National Mediation Board to post that notice. And I think at that time the law as amended June 21, 1934, compelled us to do it. I have seen the order issued by the National Mediation Board in reference to it. I had nothing to do with whether as far as these last two notices were concerned, we were merely complying with the law. As I told you, Mr. Bronson got that out and asked me to sign my name and put this out to acquaint the men with the conditions because this Bulletin had not yet been posted.

Referring again to the notice which I posted on January 20th and which I say I posted because the men asked some enlightenment, I am not familiar with the fact that Mr. Eastman objected to the notice. I am not familiar with the notice he issued to the Regional Coordinating Committee in reference to that form of notice, under date of January 22, 1934.

I had available for my examination and use what we (261) received of the communications that are issued by the Coordinator of Transportation to the various railroads. I do read them. I do not recall reading any such document as you have called my attention to. Your having called my attention to it does refresh my recollection as to whether I prepared this. Yes, I prepared this, as I have stated before, to set the men straight. At the request of some of the men, not this particular Bulletin, but to give the men information to get them straight on this particular point.

Princeton is not a terminal point. It is merely a divisional point. We have our main shops there and the Superintendent's office is there. I could not tell you how many foreign cars we clear through that point per month, I mean that either stop or pass through. They all pass through there to move over the railroad. I cannot give you approximately how many foreign cars pass that

divisional point per month on the average; I have not any idea. If by "foreign cars" you mean cars owned by others than the Virginian I would say 1200 or 1400. If one of those cars is damaged where it requires very heavy repairs we take care of it at Princeton. If the repair comes within the safety provisions of the Interstate Commerce Act, should it occur there we would repair it there. None of the trains stop there. If we should happen to have a hot box in that territory it would be repaired there. If a hand-hold became disconnected we would repair it there if we discovered it there. We have no inspecting service there. That division is (262) electrified, so they do not stop there for coal or water. If for any reason a car, or a train carrying interstate shipments, or a train made up of interstate cars happen to stop at that point and any emegency repairs were necessary, if they were found there, the repairs would be made. I am familiar, of course, with the rules of inspection governing train crews in that regard. They are supposed to find them. We have no inspection at Princeton. The engineer, the fireman and the two trainmen and the conductor are required to be constantly on the outlook and inspecting cars for emergency repairs at all points. At Princeton we have, and these figures are approximate, around ninety machinists, including the helpers and apprentices; around thirty boilermakers including the helpers and the apprentices; around one hundred and thirty-five car men including the helpers and the apprentices; around twenty-four sheet metal workers, including all that might come within the sheet metal class; around twenty-eight blacksmiths, and around fifteen electricians.

By Mr. Mulholland:

Q. You maintain there both a back shop and a front shop? A. Both what?

Q. A back shop and a front shop? A. A front shop?

Q. You are not familiar with those terms? A. No.

Q. A front shop is ordinarily where they do running (263) repairs. A. I never heard it expressed that way.

Q. How did you express it out there? A. Roundhouse, machine shop, and back shop we have at Princeton, but we have no running repair force except one man.

Q. Let me ask you this: Suppose one of your electric locomotives hauling an interstate shipment became out of repair at that point, would you require the repairs to be made by this one man or not be made at all, or would you call mechanics from any department in the shops where you could find them and put them in repair? A. We have very few mechanics and electricians at Princeton that know anything about these electric locomotives. We require the engine crew to make their own repairs and go on.

Q. You require the engine crews to repair their own electric locomotives? A. Yes, that is, I mean any repairs that may be needed on the line of road, such as fuses.

Q. Yes, but I mean suppose something should happen to that electric motor where it could not be used until it was put in order to go on? A. We would pull that locomotive right on to Mullens, if the engineer could not fix it.

Q. What would you do if such a condition occurred with a foreign freight car? A. That depends alto-
(264) gether on what the nature of the repairs were. If we could run that car to the first terminal we would run it there and cut it out. Princeton is not considered a terminal.

Q. But you maintain one hundred and thirty-five car men there, don't you? A. Yes, sir.

Q. You are not trying to say to the court, frankly, that the entire staff in Princeton relates only to intrastate commerce as distinguished from interstate commerce?

Q. Can you answer the question so I can find out what your position is? I don't know what you are driving at. A. I will have to explain it to you. I am trying to show you and the court that Princeton is no longer a running repair point. None of our trains are cut out at Princeton. We only have one engine there that is maintained on running repairs, and that is a switch engine. The other engines that pass through and the cars are maintained at Elmore and Roanoke.

Q. You have testified to all that. I am just asking the purpose of that testimony. You must have some theory you are working on.

Q. You move those men when necessary from point to point, don't you? A. The shop men?

Q. Yes. A. No.

Q. You never move a man from Princeton to Mullens (265) or from Mullens to Roanoke? A. Not unless, of course, if we cut off any of our men at Princeton shop and should any men at those other points want the job, we give them preference.

Q. Now, coming back to my question, are you endeavoring to show that the work at Princeton is solely intrastate as distinguished from being interstate? A. I have not gone into the matter far enough to know exactly what that would cover. I am simply trying to show that Princeton is a classified repair point and we have no running repairs there with the exception of this one switch engine.

It was here stated by Counsel for defendant that probably 97% of defendant's transportation is interstate transportation.

Q. Having in mind that the nature of your commerce is ninety-seven percent interstate, the repairs and work carried on at Princeton, I take it is for the use of the Railroad Company generally in carrying this commerce? A. It is to take care of the equipment.

Q. To take care of the equipment that is used in carrying this ninety-seven percent of interstate commerce. Is that right? A. Yes.

Practically all of the ninety machinists in Princeton (266) are engaged in overhauling engines, and store work. I don't think the work they do at Princeton is any different than they do in the ordinary railway machine shops. Generally our thirty boilermakers repair locomotive boilers and such work as is covered by store orders. Where they do work of that class there is not any particular difference between the character of their duties and what you find in the ordinary railway boiler-shops. Of the 135 car men at Princeton, all except 20 are engaged in what you might call general repairs to cars, heavy repairs such as is done at manufacturing points, the Virginia Iron Works and points of that kind. Practically all of these men are engaged in general repairs to our own equipment, and the great bulk of those cars are coal cars used for the purpose of carrying coal from West Virginia to wherever the coal goes. The 28 blacksmiths you might class the same as you would the

boilermakers and machinists, taking care of repairs to the equipment. They are doing practically the same class of work you find the blacksmiths doing in that kind of railroad shop. I would say the same thing as to our Sheet Metal Workers and our Electricians. All of those employes are engaged in work on cars and equipment to carry our commerce. I don't know what percentage of that is interstate commerce but these men are engaged in repairing these cars, to move the coal from West Virginia to wherever the coal goes.

On my direct examination I said "We objected to the agreement for the taking of the election." By "we" I (267) mean the Railroad Company. I thought that the Railroad Company should be a party to those elections to settle a dispute between two factions of our employes, but I was told on several occasions that they were not a party. I emphasized the fact that I did not sign the agreement to hold the election because my name appeared on the rules of the first election and I was asked to sign the rules of the second election. The court asked me if, as far as I knew, it was a prefectly fair election, that is every man had a right to vote secretly and his vote was counted secretly. I thought there was a great deal of influence brought about by using Mr. Munsey. Some of the men stated that Mr. Munsey had not been fair to the men. I did not remain in the voting booth and I don't know whether he did anything in the voting booth that would influence any man or change the fair character of the election. I don't know what Mr. Munsey did. I have not heard of anything. I have not heard of any crookedness on his part. So far as I know, as related to the right of every individual to cast a secret vote and express his own views and have it honestly counted, that procedure was carried out.

RE-DIRECT EXAMINATION

The first election held at Princeton on the 16th of August was as fair as the second election, so far as I know. I did not hear anything about it that had the appearance of unfairness or anything of that kind and I was surprised to hear of the second election being held (268) and I asked the Mediator that because I asked him if he knew of any unfairness by the officials or any of the clerks or anything, and he said he did not, but he

said that Mr. Bentley had called Mr. Jewell up over the phone and Mr. Jewell had arranged with the Mediator to hold another election and that was all he knew about it, I mean arranged with the Mediation Board.

By Mr. Hall:

Q. What objection did Mr. Bentley present to the Mediator as to the first election? A. I don't remember, Mr. Hall.

Q. When did Princeton cease to be a division point? A. Approximately seven years ago.

Q. Is it different from any other way station along the line as far as taking care of repairs are concerned, with the exception of this one engine that is used there in switching? A. It is understood that Princeton takes care of only classified repairs and store work with the exception of this work that I have explained.

When anything happens to equipment at Princeton in the course of transportation about the same thing is done with that equipment that would be done with it in the ordinary running repairs, if it happened at any other station between Mullens and Roanoke. In other words, (269) those safety appliance matters have to be taken care of. The cars or locomotives are usually moved into the first terminal if we have no repair men where the defect may be found. The twenty men that I said were engaged at Princeton in what we call running repair work are known as the Will Young gang. They have a Foreman by the name of Will Young and they are engaged in cleaning air brakes and such work as that, at Princeton. It is not done in the back shop; it is done on the repair tracks in the car yard. It has no connection with our back shop or classified repairs. These tracks are parallel with the tracks that we use for general repairs to cars. We have two tracks for running repairs and three tracks for heavy repairs. Those running repair men constitute a separate gang from the gangs that work in our back shops.

Q. You were asked a good many questions about this Bulletin of January 20, 1934. I just want to ask you if it is a fact that the rumors referred to in this first paragraph of the Bulletin were being circulated on the Virginian Railway about Company Unions being outlawed? A. Let me hear that, please.

Q. Hear? A. Yes.

Q. Prior to the Bulletin, was there much dissatisfaction among the men on account of those rumors that were (270) being circulated? A. Yes.

Q. The American Federation of Labor had been conducting an active campaign there on membership, had they not, prior to that time? A. This happened about the time that members of the American Federation of Labor were circulating petitions at different points on the railroad for employes to sign showing their desire to become members of the American Federation of Labor. There were a great many threats made to our men telling them if they did not become members and support this paper or petition that they would possibly lose their jobs, and those different fellows came to me—

By the Court:

Q. Did you hear the threats yourself? A. No, I am simply telling now what the men came to me and reported to me, that these agents had told them that the home organization would be outlawed and they could not work for the railroad if the American Federation of Labor won out.

Mr. Donnally: May it please the court, it has been stipulated between counsel for plaintiffs and counsel for defendant that the eligible voters at the election of August 20th, divided among the six crafts, were as follows: Machinists 267; Blacksmiths 46; Boilermakers 79; Electricians 114; Sheet Metal Workers 52; Car Men 266.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

System Federation No. 40, etc., et al.,
Plaintiffs,

(271) v. In Equity No. 329.

The Virginian Railway Company,
Defendant.

I, Luther B. Way, United States District Judge for the Eastern District of Virginia, do hereby certify that

the above statement of the evidence, which has been prepared by attorneys for the Appellant and agreed to by attorneys for the Appellee, respectively, appears to be true, complete and properly prepared, and the same is hereby approved.

Given under my hand this 17th day of December, 1935.

LUTHER B. WAY,
United States District Judge.

Norfolk, Virginia.

COMPLAINANTS' EXHIBIT NO. 1.

STATEMENT TO THE MEMBERS

(272) of

MECHANICAL DEPARTMENT ASSOCIATION

of

THE VIRGINIAN RAILWAY COMPANY

on

EMPLOYEE REPRESENTATION

By: J. W. SASSER,
Superintendent of Motive Power.

July 11th, 1934.

On June 16th, 1934, a bill was passed by Congress (273) amending certain sections of the Railway Labor Act of 1926, and was approved by the President. The purposes of the Act are declared to be, briefly,—

(1) To avoid any interruption to commerce.

(2) To forbid any limitation upon freedom of association among employees or of any denial of the right of employees to join Labor Organizations.

(3) To provide for the independence of carriers and employees in the matter of self-organization.

(4) To provide for the prompt settlement of disputes concerning rates of pay, rules and working conditions.

(5) To provide for the prompt settlement of all dis-
(274) putes growing out of grievances or the interpretation of agreements covering rates of pay, rules or working conditions.

The Act declares it to be the duty of all carriers and their employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions and to settle disputes in conference between representatives authorized to confer and that such representatives shall be designated by the respective parties without interference, influence or coercion, by either party over the designation of representatives.

Statements have been made in the press and elsewhere, in many instances with a purpose, that the Amendment to the Railway Labor Act has abolished Company Employee Unions. There is nothing in the Amendment to the Act which prohibits Company Unions, nor the right of such Unions to designate representatives of their choice for the purpose of confering with representatives of the carrier.

Let it be understood at the outset that the Management of The Virginian Railway Company is in no sense opposed to the principle of collective bargaining, and has practiced it for years. It not only accepts the principle and entirely approves of it, but does not believe
(275) that any dispute can be settled with the same degree of success or of satisfaction where one side of the controversy has no interest in the property and has no familiarity with the problems involved, which only an employee can have.

Recent persistent efforts of the American Federation of Labor seeking authorization from members of the Mechanical Department Association of The Virginian Railway Company to represent the members in future conferences with representatives of The Virginian Rail-

way Company, makes it necessary for the Management to present to its employees who will be affected a plain statement of facts in connection with the proposed change. Before the members of that Association shall act each member owes it to himself that he should give due consideration to some of the facts involved in the proposed change from Company Employee Representation to National Organization Representation. When such consideration has been given, the employees and members of that Association are entirely free to exercise their choice of representatives, free from fear or favor from their employer.

Since its organization in 1922 the Mechanical Department Association of The Virginian Railway Company (276) has, in pursuance of its agreement which has stood the test of years, worked out without friction all questions that have arisen between them. The relations between the Company and the members of the Association are harmonious and the arrangement has proved satisfactory. The mutual acquaintance of representatives of the employees and of the Management, the knowledge of the property and the interest of the men in it creates a condition which is most desirable. None can fail to appreciate the seriousness of changing a condition which has proved so satisfactory in the past.

It will hardly be denied by any of its members that the chief object of the American Federation of Labor is eventually to bring about the closed shop in industry, thereby regimenting labor and reducing the individual to a mere cipher with little or no influence in the management of his local Association.

On July 1, 1922, practically all of the Mechanical Department employees of The Virginian Railway Company affiliated with System Federation No. 40, Railway Employees Department, American Federation of Labor, went on strike. This action resulted from a strike order issued by the executives of the organizations comprising (277) the Federated Shop Crafts. This course, as is well known, proved disastrous to the organizations and unfortunate to the men composing them.

On July 3, 1922, the U. S. Railroad Labor Board is-

sued a circular suggesting that the employees remaining in the service and the new employees succeeding those who left the service take steps as soon as practicable to form such an Association or Organization as might be deemed necessary to function in the representation of the employees before the Board. In line therewith, on October 1st, 1922, the shop employees of The Virginian Railway Company organized the Mechanical Department Association, with which all past negotiations pertaining to rates of pay, rules and working conditions, have been conducted. For the past year an attempt has been made to discredit in every manner this Association (commonly called Company Union) by professional representatives of organized labor in an effort to have its members authorize the Railway Employes Department, American Federation of Labor, to represent them in negotiations with the Railway Company rather than the Mechanical Department Association, which has represented them successfully for the past twelve years. And it has come to the attention of the Management that as an inducement for representation by American Fed-
(278) eration of Labor promises of increased rates of pay and other matters have been made that cannot be fulfilled. Prior to the strike of 1922 there was continued dissention that frequently resulted in strikes without a single benefit, but did result in great loss of wages to the employees. For twelve years perfect harmony has prevailed. There have been no strikes and disputes have been promptly adjusted with satisfaction. It will be recalled that the Management in its negotiations with the representatives of the organization has time and again stated that it would be fair and impartial in its dealings with its members and would provide as good working conditions and as high rates of pay as was given by any other railroad, and it is known that this promise has been carried out, and that the same policy will be continued.

In the depression period from July, 1932, to July, 1933, at the Huntington, West Virginia, shops on the Chesapeake and Ohio Railway the men averaged 9.1 days per month with a greatly reduced force, while on The Virginian Railway at the Princeton shops the men averaged 12 days per month with practically a full force, or

in other words the Virginian men worked 31.8% more than the men on the Chesapeake and Ohio.

If the employees of the Company desire to affiliate (279) with the National organization they are free to do so. Such a course will, it is believed, and the past has so shown, result in differences and controversies between the Company and non-employee representatives, which would be avoided if there is a mutuality of interest and a relationship that has in it something of a personal nature. The Mechanical Department Association is founded on the basis of harmony, and it is the desire of the Management that this harmonious relationship shall continue.

The above statement is made so that each member of the Mechanical Association and those employees who are not members may give careful consideration to all matters entering into the question of representation by employees of the Company on the one hand or on the other hand by representation by members of the American Federation of Labor.

The Management therefore hopes that each man for himself will, before acting, give careful thought to the subject of representation.

COMPLAINANTS' EXHIBIT 2.

(280) NOTICE OF ELECTION

To Be Held Under The

RAILWAY LABOR ACT

Involving

SHOP CRAFTS EMPLOYEES

and

THE VIRGINIAN RAILWAY COMPANY

TO ALL CONCERNED:

A secret ballot will be taken of eligible voters on the question of representation as submitted to the National Mediation Board, by the Railway Employees Department of the American Federation of Labor—at,

Place	Date	Between the hours of

The vote will be taken and counted separately for each of the six shop craft organizations and each organization receiving the majority of the total votes shown on the eligible list of voters will be recognized as representatives of the employees in question.

Attention is called to Section 2, Railway Labor Act, providing that elections shall be free from interference, influence or coercion, also that it is unlawful for any carrier to interfere in any way with the organization of its employees.

Report any violation to the Mediator, or the National Mediation Board, Washington, D. C.

The employees eligible to vote shall be those below the rank of foreman in the crafts generally known as Machinists, Blacksmiths, Sheet Metal Workers, Electrical Workers, Boiler Makers, Carmen and Coach Cleaners and their Apprentices and Helpers who were on the payroll of the Virginian Railway Co. covering the first half of April, 1934, or, who have been furloughed since April 1, 1934.

A list of eligible voters has been prepared by the Mediator and the names of the said eligible voters are posted at each voting point on the carriers bulletin boards, by mutual agreement all other points will be voted by mail.

Only those employees shown on such list will be permitted to vote, except that in the event the name of an employee is left off the official list in error, upon proof of such error the employees name will be added to the list and such employees allowed to vote.

The election will be supervised by Mr. R. B. Bronson, Mediator, National Mediation Board and he shall interpret and apply the rules governing the election, and decide on all challenged votes.

The Railway Employees Department of the American Federation of Labor will be represented by C. L. Bentley, The Mechanical Department Association will be represented by J. W. Munsey, who shall act as observers and assist the Mediator in the collecting and counting of the ballots, identifying individual voters upon request, and assist him in any way as may be necessary for the successful completion of the vote.

COPY OF THE OFFICIAL BALLOT IS MADE A PART OF THIS NOTICE.

COMPLAINANTS' EXHIBIT 2.

(281) OFFICIAL BALLOT

To determine representation of

SHOP CRAFT EMPLOYEES

THE VIRGINIAN RAILWAY COMPANY

DO NOT SIGN YOUR NAME

A. Instructions for voting:. The following instructions must be followed in casting your ballot.

B. This ballot is handed to you in person by the Government Mediator, mark an "X" in the square of your choice, fold the ballot in any manner that will hide the mark you have made, and deposit the ballot personally in the ballot box.

C. If this ballot is received by you through the mail proceed as follows: mark an "X" in the square of your choice, then place the ballot in the secret envelope marked "A," and seal the envelope without placing any mark of identification thereon. After sealing envelope "A"

place it in the mailing envelope addressed to the Government Mediator marked "B" and seal, then write your name and address in the upper left hand corner of envelope "B", (which will be destroyed after it is checked against the list of employees voting by mail and before envelope "A" is opened).

MARK AN "X" IN ONE SQUARE ONLY TO DESIGNATE YOUR CHOICE.

If you desire to be represented by System Federation No. 40, Railway Employes Department, American Federation of Labor

MARK AN "X" IN THIS SQUARE ☐

If you desire to be represented by the Mechanical Department Association of The Virginian Railway Company

MARK AN "X" IN THIS SQUARE ☐

(The writing of more than one X will make the ballot illegal.)

THE VIRGINIAN RAILWAY COMPANY
By J. W. SASSER,
Supt. Motive Power.

J. W. MUNSEY,
General Chairman Mechanical Department Association.

C. L. BENTLEY,
Representing Division 2, Railway Employees Department, American Federation of Labor.

Complainants' Exhibit No. 3 consisting of four parts (282) is otherwise included in the record as follows:

Agreement of August 18th, 1934, for election held Au-

gust 20th, 1934, and Rules and Regulations for said election are attached to the Bill of Complaint as Exhibit "A" and Exhibit "B" pages 31 & 34 respectively.

Agreements dated August 18th, 1934, relative to "valid reasons" and giving notice to employees regarding voting are set out on page 67 respectively.

Complainants' Exhibit 4 being the certification of the (283) National Mediation Board dated September 13th, 1934, is quoted in the Bill of Complaint, page 13.

(284) **COMPLAINANTS' EXHIBIT 5.**

Sheet 1

SYSTEM FEDERATION NO. 40

RAILWAY EMPLOYES DEPARTMENT A. F. OF L.

Princeton, W. Va., September 21, 1934.

Mr. C. Bucholtz, President,
Virginian Railway Company,
Terminal Building,
Norfolk, Va.

Dear Sir:

System Federation No. 40, of the Railway Employes' Department of the American Federation of Labor has received the certification from the National Mediation Board, their case R-5, dated September 13, 1934, showing that System Federation No. 40, of the Railway Employes' Department of the American Federation of Labor has been duly designated and authorized to represent the Mechanical Department employes of the Virginian Railway Company, generally known as Machinists, Boilermakers, Blacksmiths, Sheet Metal Workers, Electrical Workers, Carmen, the helpers and apprentices of the foregoing and coach cleaners.

This letter is to request a conference with you, or such officer of the Railway Company as you may designate for

the purpose of entering into a memorandum of understanding and agreement with System Federation No. 40, of the Railway Employes' Department of the American Federation of Labor whereby the existing agreement between the Virginian Railway Company and the above named employes represented by the Mechanical Department Association of the Virginian Railway shall be transferred to and become an agreement between the Virginian Railway Company and System Federation No. 40, of the Railway Employes' Department of the American Federation of Labor, representing the above named crafts of employes, with certain reservations and understandings to be negotiated and contained in the memorandum of understanding and agreement heretofore mentioned.

In making this request we desire to fulfill the obligations imposed upon System Federation No. 40, by the amended Railway Labor Act, wherein it is made clear that the representatives selected by the majority of a craft of employes of a carrier is required to represent that craft of employes for all purposes of the Act.

We are agreeable to and we propose to accept the existing contract, as outlined above, with the understanding that by so doing the views or policies of neither the management or System Federation are thereby prejudiced, and that all interpretations of the contract shall be negotiated hereafter in accordance with the provisions of the amended Railway Labor Act.

Our understanding is that the contract now in effect is the one which was negotiated, effective as of November 15, 1922. It is further our understanding that the progressive restoration of the 10% deduction in pay is covered by letter signed by you under date of May 2nd, 1934. If any amendments have been made to the agree-
(285) ment we will appreciate receiving copy of same prior to the time the memorandum of understanding and agreement is negotiated.

In the initial conference, our Committee will be accompanied by W. H. Gorman, authorized representative of the Railway Employes Department of the American Federation of Labor.

Please accept this letter as establishing the authority of the undersigned to represent the above named crafts of employes of the Virginian Railway, under the seal of System Federation, signed by Secretary.

We will appreciate conference as early as it can be arranged. In replying, please address W. H. Gorman, 129 Alleghany Street, Clifton Forge, Va., and E. R. Belcher, Rt. No. 1 Box 202 Princeton, W. Va.

Sincerely and cordially yours,

EXECUTIVE BOARD,
System Federation No. 40, Railway
Employes Department A. F. of L.

(Signed) E. L. PRESTON,
General Chairman, I. A. of Machinists.

(Signed) ANDY DUNCAN,
General Chairman, I. B. of B. S. S. S. B.
and H. of A. Boilermakers.

(Signed) W. S. PENTRUFF,
General Chairman, I. B. of B. S. D.
F. and H. Blacksmiths.

(Signed) W. M. SARVER,
General Chairman, S. W. W. I. A.
Sheet Metal Workers.

(Signed) A. P. WYATT,
General Chairman, I. B. of E. W.
Electrical Workers.

(Signed) P. L. ALLEN,
General Chairman, B. R. C. of M.
Carmen.

(Signed) E. R. BELCHER,
Secretary-Treasurer, System
Federation No. 40.

(Signed) W. H. GORMAN,
Authorized Representative of the
Railway Employes Department,
(Seal) A. F. of L.

(286) **COMPLAINANTS' EXHIBIT 6.**

At Huntington, W. Va., October 5, 1934.

Mr. C. Bucholtz, President,
Virginian Railroad Company,
Terminal Building,
Norfolk, Va.

Dear Sir:

I wish to refer to letter addressed to you at Princeton, W. Va., September 21, 1934, which was signed by the Executive Board of System Federation No. 40, Railway Employes Department, A. F. of L. and the undersigned, requesting conference with you, or such officer of the Railway Company as you may designate for the purpose of entering into a memorandum of understanding and agreement with System Federation No. 40, of the Railway Employes Department of the American Federation of Labor, as outlined in the letter referred to above.

Up to this time I have not received a reply from you and feel that the matter has either been overlooked or the letter misplaced through the mail, as the Law provides that:

". . . within ten days after receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: . . . etc."

We will appreciate a reply as early as convenient in order that we may make the proper arrangements for conference, I am,

Yours very truly,

W. H. GORMAN,
Authorized Representative of the
Railway Employes Department,
A. F. of L.

Copy E. R. Belcher,
Rt. No. 1 Box 202 Princeton, W. Va.

(287) **COMPLAINANTS' EXHIBIT 7.**

Sheet 1

THE VIRGINIAN RAILWAY COMPANY

Terminal Building

Norfolk, Va.

C. Bucholtz,
President.

Copy.

October 12th, 1934.

Mr. W. H. Gorman, Representative,
Railway Employes Department, A. F. of L.,
129 Alleghany Street,
Clifton Forge, Va.

Dear Sir:

Yours of the 5th.

Enclosed is a copy of my letter of September 29th addressed to E. R. Belcher in reply to the letter to which you referred.

Yours very truly,

(Signed) C. BUCHOLTZ,
President.

Sheet 2

(288) Copy.

THE VIRGINIAN RAILWAY COMPANY

Terminal Building

Norfolk, Va.

C. Bucholtz,
President.

September 29, 1934.

Mr. E. R. Belcher,
Route No. 1, Box 202,
Princeton, W. Va.

Dear Sir:

This will acknowledge receipt of your letter of September 21st, concerning the election of persons to represent the employees of the Mechanical Department of the Virginian Railway.

The legality of this election is a subject of correspondence with the National Mediation Board and when this question is finally determined we will write you again.

Yours truly,

(Signed) C. BUCHOLTZ,
President.

CB-M

(289) **COMPLAINANTS' EXHIBIT 8.**

THE VIRGINIAN RAILWAY COMPANY

Terminal Building

Norfolk, Va.

C. Bucholtz,
President.

October 12, 1934.

Mr. Wm. M. Leiserson, Chairman,
National Mediation Board,
Washington, D. C.
Dear Sir:

Referring to the Board's letter of October 2nd, in reply to our letter of September 29th, concerning the election of representatives of employees in the Mechanical Department of the Virginian Railway.

Your letter does not satisfactorily give the information which my previous letters to you have requested. However, waiving this matter for the time being, and waiving your re-statement that the Railway Company has no interest in the matter, I wish to repeat what we have maintained since April 27th last, that up to the present there has been no dispute between the employees of the Railway Company which called for the services of the Mediation Board.

Now, however, a dispute appears to have developed, of which you have been notified in a letter from Mr. H. C. Hearn, General Chairman Carmen, of October 3rd, a copy of which I have received. The letter of Mr. Hearn clearly indicates what we have known and what your representative on the ground knew at the time and advised Mr. Cook, Secretary of the Board, by telephone, that the representative of the Mechanical Department Association of The Virginian Railway Company had such affiliations with the American Federation of Labor as

should have disqualified him from acting as a representative.

In view of the situation above outlined, and in view of the fact that the rules first agreed upon providing for an election based upon the majority of eligible voters were changed to the basis of a majority of the votes cast, contrary to my understanding of the law, there developed in my opinion such prejudice to a fair election that the Board is warranted in ordering another election to be held. My suggestion and request, therefore, is that after the lapse of due time to quiet the present agitation and in order to settle the present dispute and to overcome the discord that now exists, so the Virginian will no longer suffer losses in efficiency, etc. now involved by the prevailing condition, a new election should be held under the supervision of properly qualified representatives of the employees to determine the representation of the employees as required by the Act.

In any event it is now necessary in view of the situation that has developed and as is shown in the letter from Mr. Hearn above referred to, for us to be advised as to the position of the Railway Company in respect to the majority representation of the Carmen, and also, in line with recent developments to be advised in regard to the proper representation of the men who did not participate in the election.

Yours truly,

(S) C. BUCHOLTZ,
President

CB-M

(290) **COMPLAINANTS' EXHIBIT 9.**

Copy.

October 15, 1934.

Mr. C. Bucholtz, President,
The Virginian Railway Company,
Terminal Building,
Norfolk, Virginia.

Dear Sir:

Replying to your letter of the 12th addressed to the Chairman, I am directed by the Board to inform you that the Board has made its investigation and certification of representatives in accordance with Section 2, Ninth, of the Railway Labor Act.

Very truly *truly,*

(Signed) GEORGE A. COOK,
Secretary.

WML:S

(291) **COMPLAINANTS' EXHIBIT 10.**

THE VIRGINIAN RAILWAY COMPANY

Terminal Building

Norfolk, Va.

C. Bucholtz,
President.

October 19, 1934.

Mr. B. M. Jewell, President,
Railway Employees Department,
American Federation of Labor,
844 Rush St., Chicago, Ill.

Dear Sir:

On my return from a trip to Detroit where I was in

the interest of securing some business for the Virginian Railway Company to the Ford Plant located at Norfolk, I found your message of October 16th.

There has developed on the Virginian Railway very considerable opposition to the manner in which the Mediation Board conducted an election during the month of August, 1934, and this has been the subject of correspondence between ourselves and the Mediation Board, and to date a satisfactory reply from the Board has not been received.

We have received a request for a meeting from the employees on the Virginian Railway and we attach hereto copy of our letter of September 29th, addressed to Mr. E. R. Belcher, and of October 12th addressed to Mr. W. H. Gorman, regarding the question of a meeting.

With reference to negotiating an agreement covering wages and working conditions, wish to advise that we already have an agreement with our employees and are not in position to negotiate a new one until the existing agreement has been properly cancelled in a legal way.

Pending a satisfactory answer from the Mediation Board, we are not in a position to enter into a conference at this time. However, unless advised to the contrary we will be glad to see representatives of the employees in this office at Norfolk, Va., on Wednesday, November 14th, at 2:00 P. M.

We have no knowledge of any action on the part of our employees at Victoria, but as we interpret the Amendment to the Railway Labor Act these employees have a perfect right to draw up a petition to present to the Mediation Board regarding who shall represent them on the Virginian Railway.

Yours truly,

(Signed) C. BUCHOLTZ,

CB-M President.

(292) **COMPLAINANTS' EXHIBIT 11.**

INTERNATIONAL ASSOCIATION OF MACHINISTS

District No. 66

C. & O. RAILWAY SYSTEM

Copy.

At Princeton, W. Va., November 5, 1934.

Mr. C. Bucholtz, President,
Virginian Railroad,
Terminal Building,
Norfolk, Virginia.

Dear Sir:

In compliance with your letter of October 19, 1934, addressed to Mr. B. M. Jewell, President Railway Employes Department, American Federation of Labor, which reads in part:

". . . we will be glad to see representatives of the employees in this office Norfolk, Va., on Wednesday, November 14th, at 2:00 P. M."

We will be glad to arrange to meet you in your office on the date and at the time mentioned.

Yours very truly,

W. H. GORMAN,
Representative Railway Employees
Department A. F. of L.

Cy-Mr. B. M. Jewell
" E. R. Belcher

(293) **COMPLAINANTS' EXHIBIT 12.**

THE VIRGINIAN RAILWAY COMPANY

Terminal Building

Norfolk, Va.

C. Bucholtz,
President.

November 9, 1934.

Mr. E. R. Belcher,
Route 1, Box 202,
Princeton, W. Va.

Dear Sir:

I regret very much that I shall have to postpone to a later date the meeting with representatives of employees scheduled tentatively for November 14th at Norfolk.

Conditions have arisen which make it impracticable to have the meeting on that day. Copy to National Mediation Board, Washington, D. C.

Yours truly,

(Signed) C. BUCHOLTZ,
President.

(This letter was transmitted by telegram to W. H. Gorman, and copied from telegram and so framed:)

Copy.

(294) **COMPLAINANTS' EXHIBIT 13.**

WESTERN UNION

Huntington, W. Va., Nov. 12th, 1934.

Mr. C. Bucholtz, President, Virginian Railroad,
Terminal Bldg., Norfolk, Vir.

Accompanied by Committee we will call at your office November Fourteenth for conference in order that we may lay before you what has happened on the Virginian Railroad violation Railway Labor Act and the understanding we desire to reach with you Stop As this is very urgent we trust that you can arrange to meet us Leaving here tonight for Norfolk Atlantic Hotel

W. H. GORMAN.

(295) **COMPLAINANTS' EXHIBIT 14.**

WESTERN UNION

Norfolk Va. November 13 1934.

W. H. Gorman
Representing Railway Employes Department
Huntington W. Vir.

Your night letter twelfth to Mr. Bucholtz Meeting referred to has been postponed and Mr. Belcher Princeton West Virginia so notified by letter from Mr. Bucholtz dated November ninth

W D BAKER
Assistant to President.

(Copy: This message was not received before arriving Norfolk as I left Huntington the night of the 12th.

W. H. G.)

Complainants' Exhibit 15 being letter of November
(296) 19th, 1934, from C. Bucholtz to E. L. Preston, is
set out on page 75.

(297) **COMPLAINANTS' EXHIBIT 16.**

Norfolk, Va., November 19, 1934.

Mr. C. Bucholtz, President,
The Virginian Railway Company,
Terminal Building,
Norfolk, Va.

Dear Sir:

Referring to your letter of even date addressed to E. L. Preston; the fourth and fifth paragraph reading as follows:

"I have been notified by representatives of the Mechanical Department Association of the Virginian Railway that a majority of the employees are not in favor of representation by the A. F. of L. and have demanded the right to participate in any conferences which may be held relating to labor agreement, claiming that there were irregularities in the election of August 20. Fair treatment requires that the representatives of the Mechanical Department Association of the Virginian Railway have an opportunity to have their rights in the matter properly considered and determined.

It is impracticable for me to set a definite date for a meeting until this and other matters in connection with the situation have been clarified."

Which sets forth your position in declining to set a definite date for conference.

We wish to call your particular attention to paragraph nine under the caption "General Duties" of the Amended Railway Labor Act, which has been fully complied with by National Mediation Board; their case No. R-5, Certification, under date of September 13, 1934, which reads in part:

"On the basis of the investigation and report, the National Mediation Board hereby certifies that the System Federation No. 40 Railway Employees' Department, American Federation of Labor, has been duly designated and authorized to represent the mechanical department employees of the Virginian Railway Company."

Which was further substantiated by the letter to you from National Mediation Board under date of October 15th, which should have cleared up any question of doubt. As we see it, by the position you have taken you are declining to comply with the decision of the Board.

Our request for conference has been pending with you (298) since September 21, 1934. Not withstanding the fact that paragraph six of the Amended Railway Labor Act, which reads in part:

". . . it shall be the duty of the designated representative or representatives of such carrier or carriers and such employes, within ten days after receipt of such notice of a desire on the part of either party to confer in respect to such dispute, to specify time and place at which such conference shall be held . . ."

specifically states that date for conference shall be set within ten days.

There seems to be some doubt in the minds of some of the Officials of the Virginian Railroad as to my authority to represent the Mechanical Department Employes of the Virginian Railroad. To clear up any misunderstanding which may exist I wish to refer to the part of paragraph three of the Amended Railway Labor Act, which reads:

"Representatives of employees for the purpose of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion, seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier."

I have been duly designated to represent the employes in conference to be accompanied by the ones that we may see fit.

We were hopeful that we should have the opportunity of meeting with you at this time to try and reach a more definite understanding and we are still hopeful that you will agree to reconsider the position you have taken and set a definite date to be held in very near future for conference. We understand that you are leaving the City this date and unless we receive a reply from you after we deliver this letter this afternoon, our position is that you have refused to comply with the law and treat with those certified by National Mediation Board. Therefore we will proceed to secure compliance with Law.

I will be at the Atlantic Hotel, the rest of today, after that, unless we receive a reply from you before leaving you can reach me at my home address: I am

Yours very truly,

W. H. GORMAN,
Representing Railway Employes Department A. F. of L.

Cy-President Jewell,
Railway Employes Department.

Confirmed by (Signed) E. J. PRESTON,
Chairman Executive Board System Federation No. 40 Virginian Railway.

(299) **COMPLAINANTS' EXHIBIT 17.**

THE VIRGINIAN RAILWAY COMPANY

Terminal Building,

Norfolk, Va.

C. Bucholtz,
President.

December 17, 1934.

Mr. E. R. Belcher,
Route 1, Box 202,
Princeton, W. Va.

Dear Sir:

With reference to our interchange of letters concerning a conference.

Please be advised that I have arranged for a conference at Princeton, W. Va., at Mr. Sasser's office at 2:00 P. M. on the 27th day of December, at which time we shall be glad to hear and consider any statement you have to make.

Yours very truly,

(Signed) C. BUCHOLTZ,
President.

(300) **COMPLAINANTS' EXHIBIT 18.**

This is to certify that in the election held at Victoria shops on the 23rd day of August, 1934, to determine whether or not shop crafts of the Virginian Railway Company shall be represented by the Mechanical Department Association or the American Federation of Labor, I voted to be represented by the Mechanical Department Association of the Virginian Railway.

Given under my hand this_____day of_____1934.

State of Virginia,
County of Lunenburg, ss:

Subscribed and sworn to before me this____day of ----------1934.

(301) **COMPLAINANTS' EXHIBIT 19.**

August 17th, 1934.

Mr. J. W. Munsey, Chairman
Mechanical Department Association,
Princeton, W. Va.

Dear Sir:

In the designation of a representative to assist the Mediator now on this Railroad for the purpose of taking a vote on the question of representation of the Shop Craft Employees, it is my desire that my craft be represented by: J. W. Munsey.

Signed G. R. FRANKLIN,
Chairman, Carmen.

(302) **COMPLAINANTS' EXHIBIT 20.**

August 17th, 1934.

Mr. J. W. Munsey, Chairman,
Mechanical Department Association,
Princeton, W. Va.

Dear Sir:

In the designation of a representative to assist the Mediator now on this Railroad for the purpose of taking a vote on the question of representation of the Shop Craft Employes, it is my desire that my craft be represented by: J. W. Munsey.

Signed ANDY DUNCAN,
Chairman Boilermakers.

(303) **COMPLAINANTS' EXHIBIT 21.**

August 17th, 1934.

Mr. J. W. Munsey, Chairman,
Mechanical Department Association,
Princeton, W. Va.

Dear Sir:

In the designation of a representative to assist the Mediator now on this Railroad for the purpose of taking a vote on the question of representation of the Shop Craft Employes, it is my desire that my craft be represented by: Mr. J. W. Munsey.

Signed R. S. HICKOK,
Chairman Electrical Workers.

(304) **COMPLAINANTS' EXHIBIT 22.**

August 17th, 1934.

Mr. J. W. Munsey, Chairman,
Mechanical Department Association,
Princeton, W. Va.

Dear Sir:

In the designation of a representative to assist the Mediator now on this Railroad for the purpose of taking a vote on the question of representation of the Shop Craft Employes, it is my desire that my craft be represented by: J. W. Munsey.

Signed J. W. MUNSEY,
Chairman, Machinists.

(305) **COMPLAINANTS' EXHIBIT 23.**

INDEPENDENT SHOP CRAFT ASSOCIATION OF VIRGINIAN RAILWAY COMPANY

Application for Membership.

----------, 193--

I hereby make application for membership in the Association of----------, Helpers and Apprentices. I understand this Association is free from outside dictation, the purpose of which is to provide an adequate and prompt means of presentation, consideration and adjustment of any grievances that may now exist or may hereafter develop affecting in any way the working conditions, rates of pay or other related matters of mutual interest to the Management and the Association.

I hereby agree to pay the monthly dues as provided for in the by-laws of the Association.

(Signed) ----------

(Occupation) ----------

(Location) ----------

(Date Employed) ----------

(306) **COMPLAINANTS' EXHIBIT 24.**

CONSTITUTION

of

MECHANICAL DEPARTMENT ASSOCIATION

of

THE VIRGINIAN RAILWAY COMPANY

(307) PREAMBLE

To promote a spirit of co-operation and friendly and cordial relations between the company and its shop employees by prompt and fair adjustment of all matters affecting rates of pay and working conditions, this association is formed to be known as the Mechanical Department Association of the Virginian Railway Company.

(308) ARTICLE I.

(a) All Mechanical Department employees, as follows: Machinists, Apprentices and Helpers; Boilermakers, Apprentices and Helpers; Blacksmiths, Apprentices and Helpers; Sheet Metal Workers, Apprentices and Helpers; Electricians, Apprentices and Helpers; Carmen, Apprentices and Helpers, except those with supervisory duties, provided they are acceptable American citizens, may exercise voice or vote in the affairs of the association, such participation to terminate on severance of active employment with Mechanical Department.

Each mechanic, apprentice and helper, as provided above, may become a charter member upon subscribing to the constitution of the organization. Thereafter, each applicant for membership shall sign a regular application blank. Each applicant for membership shall be vouched for by two members in good standing. Appli-
(309) cation shall be filed with Local Committeeman representing the applicant's department, shall be considered by the system board, and, if found worthy and qualified, may be elected by a majority vote of the system board.

There shall be no initiation fee, or monthly or annual dues. The System Board may order an assessment, not to exceed $2.50 per annum, whenever, in their opinion, it is necessary. Notice of each assessment called by the system board must be mailed by the Secretary-Treasurer to each member at least 30 days before it is due. It shall be, and is hereby, made the duty of every member of the association to remit promptly the amount of each assessment levied by the system board to the Secretary-Treasurer.

ARTICLE II.

(a) Local committees consisting of two shall be elected for each Master Mechanic's jurisdiction for each trade, viz., Machinists, Boilermakers, Blacksmiths, Sheet (310) Metal Workers, Electricians, Carmen and their respective Apprentices and Helpers.

Local Committeemen shall have had not less than three years continuous service in the Mechanical Department prior to election (this provision not to apply to those in the service October 1, 1922). Local Committeemen shall serve for a term of two years. The Committeeman receiving the majority vote shall act as Chairman, and the other as Secretary of the Local trade committee. The Secretary will keep minutes of all meetings which will be accessible to inspection of all members.

(b) The Chairman of the six trades committees shall ex officio constitute the division or shop committee, who shall elect by vote a Chairman.

(c) Meetings of local, division or shop committees may be held from time to time on call of a number of (311) employes, to be fixed by such committee, or on call of the Chairman, or on request of the management.

(d) The local committees of each trade shall elect by vote a member of such local committee to serve for one year from October 1st of each year, as member of system board of six, one representing each of the trades. The System Board shall by vote elect from their number a General Chairman, Vice Chairman and Secretary-Treasurer.

The System Board shall have final authority in the disposition of all matters properly appealed to it under the by-laws. Meetings of System Board may be held from time to time on request of a majority of its members, or a majority of the local trades committees Chairmen, or on the call of the Chairman of the System Board.

Three members of the System Board shall constitute a quorum. The Chairman of the System Board may be

(312) delegated by the Board with full authority to dispose of any or all matters included in such authority.

The Chairman, Vice Chairman and Secretary-Treasurer of the System Board shall ex-officio act as Chairman, Vice Chairman and Secretary-Treasurer of this association.

(e) Vacancy on any local committee or system board shall be filled for the unexpired term by election by trade effected.

(f) Election of local committees shall be held on the first Tuesday of September of each election year, by secret ballot for candidates nominated by not less than three members, and posted not less than five days previous to election, and the organization of shop committees and system board shall be completed as soon as practicable thereafter.

(g) A representative shall be declared to have vacated office upon severance of active relations with the (313) company's Mechanical Department, or upon assuming a position of supervisory nature.

ARTICLE III.

(a) Any member or group of members, or the management, may at any time present suggestions, request or complaint to the respective committees for full hearing and fair consideration.

(b) Employes having suggestions or grievances shall first submit them to the immediate supervisor, and if adjustment cannot there be made they may be referred to the local committee for consideration and disposition.

(c) The course of appeal shall be from the local committee to the division or shop committee. Failing in satisfactory settlement by the division or shop committee and the Master Mechanic, the matter may be referred to the system board for handling with the Superintendent of Motive Power.

(d) All votes shall be by secret ballot, supervised and
(314) counted by existing committees to avoid undue influence or interference with voters in any manner whatsoever, and to prevent any fraud in the count of ballots in accordance with the following rules:

1. Nominations shall be by petition signed by 25 per cent of the qualified voters of the election district. An election district shall be the jurisdiction of a Master Mechanic.

2. The election ballot for each district shall contain the names of all those nominated as a result of petition as provided in Rule 1.

3. The number of candidates for which a voter is entitled to vote shall be stated on ballot. If this number is exceeded the ballot shall not be counted.

4. The voter shall indicate his preference on the election ballot by placing an X opposite the name or names
(315) of the candidates he wishes to elect. Any other mark or marks shall render ballot void.

5. Two tellers appointed by the local committee with two appointed by the Master Mechanic shall conduct the election, see that none but members of the association are permitted to vote, shall count the ballots, and certify the results to the Master Mechanic, and to the System Board.

The System Board on or before August 15th of each year shall determine and announce to the members, the date of election in each Master Mechanic's jurisdiction, the hour during which vote shall be conducted, type and location of ballot boxes, and voting booths, form of ballots, and conditions under which voting by mail may be permitted, together with any other regulations not inconsistent with this constitution, designed to preserve the secrecy and propriety of the ballot.

(316) ARTICLE IV.

Local committees may with sanction of employes they

represent, adopt by-laws for local government, not inconsistent with this constitution, to become effective when approved by the System Board.

Amendments to this constitution must be approved by the System Board, and to become effective must be ratified by a two-thirds vote of the members of the association.

This constitution shall take effect October 1, 1922.

(317) COMMITTEE ON CONSTITUTION

Geo. A. Porterfield	Machinists	Princeton, W. Va.
R. G. Seaborn	Machinists	Victoria, Va.
George Kelly	Boilermaker	Princeton, W. Va.
J. S. Dupriest	Boilermaker	Victoria, Va.
C. M. Vest	Blacksmith	Princeton, W. Va.
J. C. Holt	Sheet Metal Worker	Princeton, W. Va.
J. E. Hurtubise	Sheet Metal Worker	Roanoke, Va.
G. W. St. Clair	Electrician	Princeton, W. Va.
B. J. St. Clair	Electrician	Roanoke, Va.
Chas. Helvy	Carman	Princeton, W. Va.
W. J. Morton	Carman	Victoria, Va.

(318) **DEFENDANT'S "A"**

Princeton, W. Va.
Sept. 7, 1934.

Mr. J. W. Sasser:

This is a time sheet and expense acct, for the time I was assisting Mediator in taking vote on Virginian R. R. 9 days that I did not check in amounts to $53.28 and expense was $33.95 totaling $87.23.

J. W. MUNSEY,
General Chairman,
Mechanical Department Association.

(319) **DEFENDANT'S EXHIBIT "B"**

Princeton, September 12, 1934.

File 120-Elec.

Mr. J. W. Munsey, Gen'l Chairman,
Mechanical Department Association,
Princeton, W. Va.

Dear Sir:

Referring to yours of September 7th covering expenses and time lost as General Chairman of the Mechanical Department Association, while assisting the Mediator in taking a vote on the Virginian Railway.

The Amended Railway Labor Act makes it unlawful for a carrier to use its funds in maintaining or assisting or contributing to any labor representative or other agency of collective bargaining, and with this information we hesitate to grant your request that we pay you for the time lost and expenses in conducting this election. It would seem that the proper way to handle this would be to have the members of the Association pay these expenses.

Very truly yours,

(S) J. W. SASSER,
Superintendent Motive Power.

JWS:N

(320) **DEFENDANT'S EXHIBIT "D"**

MECHANICAL DEPARTMENT ASS'N
THE VIRGINIAN RAILWAY COMPANY
System Board.

Princeton, W. Va., Oct. 30, 1922.

Mr. C. H. Hix, Vice President,
The Virginian Railway Company,
Terminal Building, Norfolk, Va.

Dear Sir:

In conformity with requirements of the Transportation Act and pursuant to regulations of the United States Railroad Labor Board, a Mechanical Department Association has been permanently organized on The Virginian Railway Company as follows:

MECHANICAL DEPARTMENT ASSOCIATION
THE VIRGINIAN RY. CO.

This Association represents a large majority of mechanical craft employes now employed by that company, free from outside dictation. This association has been formed under the Transportation Act and regulations of the Labor Board in the interests of future harmony and peace; that questions of mutual interest might be amicably handled and adjusted.

This Association desires recognition by The Virginian Railway Company and requests that a date be set when the company might meet representatives of this Association to negotiate a new agreement in conformity with the rules of the Transportation Act of 1920 and the principles as set down by the United States Railroad Labor Board.

Yours very truly,

(Signed) F. M. BILLMEYER,
General Chairman, System Board
Mechanical Department, Association The Virginian Railway Co.

(321) **DEFENDANT'S EXHIBIT "E"**

November 2nd, 1922.

Mr. F. M. Billmeyer, Genl. Chairman,
System Board, Mechanical Dept. Asso.,
The Virginian Railway Company,
Victoria, Va.

Dear Sir:

Yours of the 30th requesting recognition by the Virginian Railway Company and the setting of a date to meet representatives of your Association to negotiate a new agreement in conformity with the Transportation Act of 1920, is to hand and has been given careful consideration. The Virginian Railway Company recognizes the principles of organization and welcomes the opportunity to meet your Association.

The Virginian Railway Company grants your Association full recognition to represent the Motor Power Department crafts making up your Association and herewith encloses a proposed agreement.

I can not, at this time, state definitely the date and place which my representatives can meet with you to work out a new agreement, but will advise you by wire the early part of next week, and give you sufficient advance notice to assemble your board.

Yours truly,

C. H. HIX,
Vice President.

(322) **DEFENDANT'S EXHIBIT "F"**

RAILWAY EMPLOYES' DEPARTMENT

844 Rush St., Chicago, Ill.,

March 7, 1934

No. 14B-142
8-168

Subject: Request for conference for the purpose of establishing recognition on the Virginian Railway.

Mr. C. Bucholtz,
Vice President and General Manager
Operating Department
The Virginian Railway Company,
Terminal Building,
Norfolk, Va.

Dear Mr. Bucholtz:

This is to advise that the Machinists, Boiler Makers, Blacksmiths, Sheet Metal Workers, Electrical Workers, Carmen, their helpers and apprentices, Coach Cleaners, Firemen and Oilers, Power House Employes, Round House and Shop Laborers employed by the Virginian Railway Company and its subsidiaries have, in accordance with the provisions of the Railway Labor Act, designated and authorized the undersigned as President of the Railway Employes' Department of the American Federation of Labor, to represent them.

I therefore request that you accept this letter as establishing the authority of the undersigned to represent the above referred to employes and that you, in accordance with Section 6, Paragraph 2 of the Railway Labor Act, name the date and place for conference, at which time we are prepared to prove that we are the duly authorized and designated representatives of the classes

above referred to who are employes of the Virginian Railway.

We are, within the provisions of the law, prepared to meet your pleasure as to place and date for the initial conference herein requested, but we earnestly urge that you acknowledge our letter within ten days from date of receipt of this communication setting a date for conference not later than twenty days thereafter.

In replying please address the undersigned at Room 402, 844 Rush Street, Chicago, Ill.

Very truly yours,

(Signed) B. M. JEWELL,
President.

(323) **DEFENDANT'S EXHIBIT "G"**

UNITED STATES BOARD OF MEDIATION

Washington

File No. C-932

Mr. Carl Bucholtz,
Vice President & General Manager,
Virginian Railway Co.,
Norfolk, Va.

April 17, 1934.

Dear Mr. Bucholtz:

The Railway Employes' Department, A. F. of L. has requested the services of the Board of Mediation in connection with a dispute with your Company, regarding right of that organization to represent the Machinists, Boilermakers, Blacksmiths, Sheet Metal Workers, Electrical Workers, Carmen, Firemen & Oilers, Helpers & Apprentices all classes, Coach Cleaners, Power House, Roundhouse and Shop Laborers employed by the Virginian Railway.

Petitioner states that provisions of Section 6 of the Railway Labor Act have been complied with.

The Board will be glad to receive any statement you may care to make in respect thereof regarding this case as herewith presented to you and any other helpful information you may wish to provide.

The petitioners have been requested not to submit argument or data supporting their claim, and a like request is herewith made that you, as representative of the carrier, refrain from submitting argument in this case at this time.

You are respectfully requested to forward all future communications bearing upon this matter to the Board in triplicate, as such cooperation will materially assist us to give prompt attention to matters submitted for consideration.

Very truly yours,

(Signed) GEORGE A. COOK,
Secretary, Board of Mediation.

Defendant's Exhibit "H" being letter of April 24th,
(324) 1934, from C. Bucholtz to Geo. A. Cook, is set out on page 136.

(325) **DEFENDANT'S EXHIBIT "K"**

MEMORANDUM

Norfolk, Virginia,
July 16th, 1934.

As the result of separate conferences between Mr. H. H. Reed, Mediator, Board of Mediation and Mr. J. J. Duffy, Representative, Railway Employees Department, American Federation of Labor and Messrs. Bucholtz, Markham, Loyall, Sasser and Hall representing the Virginian Railway Company on July 5th, 1934 a check of authorizations held by the Railway Employees Department, American Federation of Labor was begun on July 6th. No written agreement was signed by representa-

tives of the parties because of the fact that it was the understanding of the Mediator that the check of authorizations was of informative nature and it was not necessarily binding with the representatives of the employees or the carrier when the matter of agreeing to an election by secret ballot was later taken up for consideration and agreement.

On July 9th, prior to starting work on the check of authorizations for that date, Mr. Duffy verbally pronounced his intention of withdrawing certain classes of employees from future consideration in connection with the representatives' dispute as covered by file C-932, Board of Mediation. Mr. Duffy's proposal was promptly questioned by Mr. Markham who stated that he would state his position the following morning. On the following morning Mr. Markham protested the withdrawal of this class. Under date of July 10th Mr. Duffy formally notified the Mediator in writing of his desire to withdraw Firemen and Oilers, Roundhouse and Shop Laborers from future consideration in mediation and under date of July 13th Mr. Markham in a letter to the Mediator formally protested against the withdrawal of Firemen and Oilers, Roundhouse and Shop Laborers.

On July 14th Mr. Markham made a statement to the effect that so far as the Management was concerned the check had been entered into as a mass proposition and not on a craft basis. The result of the check of authorizations up to this time is as follows:

AUTHORIZATIONS ACCEPTED AS AUTHENTIC

Machinists Craft	123
Boilermakers Craft	53
Blacksmiths Craft	23
Sheet Metal Workers Craft	32
Electrical Workers Craft	75
Carmen Craft	98
	404

Mr. Duffy promptly took exceptions to Mr. Markham's statement that the check was being made on a mass

basis stating that he had entered into the arrangement with the understanding that the check was to be made on a craft basis. At this point the Mediator verified Mr. Duffy's understanding as to the basis on which he had agreed to participate in the check and announced that he understood President Bucholtz to say at a conference in his office on July 5th that he would prefer to conduct the check on a craft basis with the understanding that he might have a different view when the question of holding a election came up for consideration.

Owing to several differences involving further pro-
(326) cedure in mediation which the parties have been unable to dispose of by agreement, it has been found necessary to discontinue mediation conferences for the present. These differences are understood to be as follows:

STATEMENT OF DIFFERENCES BY MR. DUFFY

1. Questions right of Railway Company to require that he produce authorizations from more than 50% of the total employees involved in all classes mentioned in the original submission of the case before a vote is justified.

2. That as representative of the Railway Employees Department of the American Federation of Labor he was justified in withdrawing Firemen and Oilers, Roundhouse and Shop Laborers.

3. That he came into the check of authorizations with the understanding that employees were to be checked by crafts and not as a mass movement and that he continued to have that understanding until July 14th, 1934.

4. It is understood that this check of authorizations is not yet complete.

STATEMENT OF DIFFERENCES BY MR. MARKHAM

1. We contend that a majority is necessary to decide questions of representation whether by authorizations or election confined to single crafts or combined crafts.

2. Our contention against withdrawing Firemen and Oilers, Roundhouse and Shop Laborers is outlined in my letter of July 13th, 1934 addressed to the mediator and is substantiated by Mr. Duffy's instructions to representatives at outlying points on Friday July 6th that these authorizations must be in Norfolk not later than Monday morning, otherwise they would be thrown out, indicating that it was the intention at the beginning of this conference to include this class of employees.

3. It is our understanding that the check was to be made on the basis of mass, involving the classes of employees set forth in Mr. Jewell's letter of March 7th, 1934 addressed to Mr. C. Bucholtz, Vice President and General Manager of the Virginian Railway Company and which was submitted to the Board of Mediation accordingly and was the basis on which the Board understood it was to mediate the question. In the matter of designation by crafts we would like it made plain whether it is intended that in the event only the majority of one craft is obtained, that the representation is to be confined to that craft, or in the event that the majority of that craft would be sufficient to give a majority of mass vote of all crafts, if he is claiming that majority would give him a right to represent all of the crafts.

4. With reference to the total check of 404 set forth in Mr. Reed's statement, Mr. Duffy made the statement in the presence of the Mediator and myself that he held (327) 4 more authorizations which were in the class of Helpers that would complete his list of authorizations. Subsequently he declined to complete the check on the 4 giving as his reasons that the issues involved heretofore set forth between the Railway Employees Department and the Virginian Railway would have to be decided before he would include these 4, making a complete check of the authorizations he presented on the petitions.

The above statements of Mr. Duffy, Mr. Markham and myself are submitted, with copies to all parties concerned, as showing present status of handling.

(Signed) HARRISON H. REED,
Mediator.

(328) **DEFENDANT'S EXHIBIT "L"**

WESTERN UNION

WB235 80 Govt F Washington DC 10 143 P

1934 Aug 10 PM 2 01

C. Bucholtz
Pres The Virginian Rwy Co Norfolk Vir

Our Board has today accepted request Our File R Rive from Railway Employes Dept A F of L involving employees of The Virginian Railway generally known as Machinists Boilermakers Blacksmiths Sheet Metal Workers Electrical Workers Carmen all their Helpers and Apprentices and Coach Cleaners for investigation and certificate of representatives under the provisions of Section Two Ninth Railway Labor Act as amended Stop Mediator Bronson will represent our Board and will be at Fairfax Hotel Norfolk Virginia Monday August Thirteenth

WM M LEISERSON
Chairman Natl Mediation Board.

(329) **DEFENDANT'S EXHIBIT "M"**

THE VIRGINIAN RAILWAY COMPANY
Terminal Building,
Norfolk, Va.

C. Bucholtz,
President.

August 10, 1934.

Mr. Wm. W. Leiserson, Chairman,
National Mediation Board,
Washington, D. C.

Dear Sir:

Your wire of this date with reference to request of the Railway Employees Department, American Federation

of Labor, concerning employees on the Virginian Railway.

We just finished a mediation of this matter about the middle of July with the former Mediation Board and after a careful check of the petitions, etc., it developed that a majority of the Shop employees were not in favor of joining up with the American Federation of Labor.

This check of the matter and general airing of the case up and down the Railroad seriously interferred with our efficiency. We are therefore in hopes that the subject will be considered by the Board as closed.

Yours very truly,

(Signed) C. BUCHOLTZ,
President.

CB-M

(330) **DEFENDANT'S EXHIBIT "N"**

Princeton, W. Va., August 16, 1934.

BULLETIN

Each craft will be notified by their foreman when the Mediator is ready for them to vote.

(Signed) R. B. BRONSON,
Mediator.

(331) **DEFENDANT'S EXHIBIT "O"**

Sheet 1

Norfolk, Va., November 19, 1934.

National Mediation Board,
Washington, D. C.

Gentlemen:

As a result of our various communications, this letter is addressed to you in an attempt to clarify the situation

with respect to the selection of representatives of the shop employees of The Virginian Railway under the amended Railway Labor Act.

The Virginian Railway has a direct interest in the maintenance of friendly relations with its employees and consequently in the selection of the proper representatives with which it must deal in the settlement of disputes and grievances. The Act, however, makes no specific provision for intervention by the carrier when there is a dispute as to the regularity of the selection of the labor representatives, and I realize it has been claimed to be the theory of the Act that the carrier has no direct interest in the selection of such representatives. The circumstances of the selection of labor representatives on The Virginian, however, justify intervention by the carrier.

According to our interpretation the Act requires the determination of representatives by the majority of the employees eligible to vote. At the first election on August 16, 1934, held under the auspices of the Board, only a small proportion of the employees voted. Upon request of the American Federation of Labor a second election was called for August 20, 1934, and for the second election the Board approved an agreement made between an alleged representative of the company union and a representative of the American Federation of Labor to modify the law and permit the designation of representatives by a majority of the votes cast. We are informed that the one who acted for the existing employees organization in effecting this arrangement was not in a position to give them his unbiased action in that he had been from time to time engaged in soliciting membership for the American Federation of Labor.

At the second election the American Federation of Labor received the majority of the votes for certain crafts, but did not receive sufficient votes to constitute the majority of those eligible. Despite this irregularity, the Board on September 13, 1934 certified the American Federation of Labor as the duly elected representative of all of the Mechanical Department employees of the Virginian Railway Company.

In our opinion the law does not permit nor justify the Virginian Railway to treat with representatives of labor not properly chosen. When there has been a fundamental defect in the manner of the selection of the representatives and when the carrier is put on notice that the (332) statute has not been followed, it is the duty of the carrier to bring the matter to the attention of the Board. We submit that in justice to the carrier it is the duty of the Board to take the action necessary to determine authoritatively the proper representative of its employees with whom the company can properly deal.

We respectfully request the withdrawal of the certificate and we bespeak your careful consideration of the memorandum hereto attached.

Yours very truly,

THE VIRGINIAN RAILWAY CO.,
By (S) C. BUCHOLTZ, President.

(334) **DEFENDANT'S EXHIBIT "P"**

WALTER G. BURTON
Attorney at Law
Princeton, W. Va.

December 20th, 1934

Mr. C. Bucholtz,
c/o The Virginian Railway Company,
Terminal Building,
Norfolk, Virginia.

Dear Sir:

Please be advised that I represent the Independent Shop Crafts Association of the Mechanical Department Employees of the Virginian Railway Company, and I have been advised today by Mr. H. C. Hearn, its general chairman, to the effect that he has received information that the officials of the Virginian Railway Company intend to have a conference with the representatives of the American Federation of Labor at the general offices of J. W. Sasser in the City of Princeton, West Virginia,

on the 27th of December, 1934, at two o'clock P. M., which meeting, I am further informed, is pursuant to a certification issued by the National Mediation Board to System Federation Number 40, Railway Employees Department of American Federation of Labor to the effect that they had been duly designated, chosen and authorized to represent the Mechanical Department Employees of the Virginian Railway Company, and I have been further advised that said meeting is called for the purpose of entering into negotiations with the representatives of the American Federation of Labor to effect a working contract between the Virginian Railway Company and the Mechanical Department Employees.

Upon behalf of the Independent Shop Crafts Association, and Mr. H. C. Hearn, its general Chairman, we object to any recognition by the Virginian Railway Company of the supposed representatives of the American Federation of Labor upon behalf of the Mechanical Department Employees of the Virginian Railway Company, as well as to any contract that might be entered into between the supposed representatives of the American Federation of Labor and the Virginian Railway Company effecting in any way the rights of the Mechanical Department Employees of the Virginian Railway Company.

The Independent Shop Crafts Association through H. C. Hearn, its general chairman, represents a clear majority of all of the Mechanical Department Employees of the Virginian Railway Company, and we, therefore, urgently request that our rights in this matter be protected, and that we be permitted to be present at the hearing on December 27th, 1934, in order that we may be heard with respect to any negotiations leading to the making of any contract affecting the rates of pay, rules, and working conditions of the Mechanical Department Employees of the Virginian Railway Company.

Thanking you for your immediate attention in this matter, and for a reply by return mail, we assure you, we are.

Yours very truly,

(Signed) WALTER G. BURTON.

(335) **DEFENDANT'S EXHIBIT "Q"**

Dec. 23, 1934.

Mr. Walter G. Burton,
Attorney at Law,
Princeton, W. Va.

Dear Sir:

I have your letter of December 20th, with reference to being present at the meeting proposed to be held in Princeton, W. Va., on December 27th, in connection with Mechanical Department Employees of the Virginian Railway Company.

You no doubt understand that so long as the present Certificate issued by the National Mediation Board is in effect we cannot negotiate matters with you relating to rates of pay or working conditions. There is no reason, however, why you should not be present and given the opportunity of making any statement you wish on behalf of your clients which you may consider necessary for the protection of their rights.

Yours very truly,

(S) C. BUCHOLTZ,
President.

CB-M

(336) **DEFENDANT'S EXHIBIT "R"**

(Excerpts)

"AGREEMENT BETWEEN THE VIRGINIAN RAILWAY COMPANY AND EMPLOYES OF THE MECHANICAL DEPARTMENT REPRESENTED BY THE MECHANICAL DEPARTMENT ASSOCIATION OF THE VIRGINIAN RAILWAY COMPANY, COMPOSED OF:

"(1). Machinists, Apprentices and Helpers.

(2). Boilermakers, Apprentices and Helpers.

(3). Blacksmiths, Apprentices and Helpers.

(4). Sheet Metal Workers, Apprentices and Helpers.

(5). Electrical Workers, Apprentices and Helpers.

(6). Carmen, Apprentices and Helpers.

"REDUCTION OF FORCE

Rule 24.

"(a). When it becomes necessary to reduce expenses at any point or in any department, or subdivision thereof, the hours may be reduced to forty (40) hours per week before reducing the force. When the force is reduced, fitness and ability being equal, seniority shall govern, subject to the provisions of Rule 16. Men to take the rate of the job to which assigned.

"(b). Twenty-four (24) hours' notice will be given before hours are reduced. If force is to be reduced, forty-eight (48) hours' notice will be given the men affected before the reduction is made and lists will be furnished the local committee.

"(c). Unless an employe, laid off by reason of a force reduction, is notified in writing when laid off that his services are such he cannot be re-employed, to retain his seniority rights he must keep on file with the officer notifying him of the reduction his address, and renew same as changed. Failure to file or renew the address, or to report for duty within seven (7) days after notice shall have been mailed to the last recorded address, will automatically sever his relations with the company.

"(d). Hours may be restored before restoration of force.

"(e). In the restoration of forces, senior laid-off men, if available, will be returned to their former positions or class of work, except that when changes have been made

in the assignment, resulting in all the positions and classes of work being bid in by senior employes, then those employes being restored will be given whatever there is open.

"(f). The local committee will be furnished a list of men to be returned to service.

(337) "HANDLING GRIEVANCES

Rule 33.

"(a). Should an employe subject to this agreement feel that he has been unjustly dealt with, or that any of the provisions of this agreement have been violated, the matter may be taken to the immediate supervisor, and if adjustment cannot there be made, it may be referred to the local committee for consideration and disposition. The case may then be taken to the foreman, general foreman, or Master Mechanic, each in their respective order by the duly authorized local committee.

"(b). If stenographic report of investigation is taken, the committee shall be furnished a copy if requested.

"(c). Failing in satisfactory settlement between the shop committee and the Master Mechanic, the matter may be referred to the system board for handling with the Superintendent Motive Power.

"(d). Conference between local officers and local committee will be held at a time set by the local officers, but so far as practicable during working hours, without loss of time to the committeemen.

"(e). In event of failure to reach a satisfactory conclusion by conference between the system board, or its chairman when authorized, and the Superintendent Motive Power, the matter may be referred to the higher officials designated to handle such matters, in their respective order, and conference shall be granted within ten days of date of application. In the event of disagreement, either the Management or the system board may,

if they so elect, appeal to the United States Railroad Labor Board under the provisions of the Transportation Act, decision of the Labor Board to be final.

"(f). Prior to the assertion of grievances as herein provided, and while questions of grievances are pending, there will neither be a shut down by the Company nor a suspension of work by the employes.

"INVESTIGATIONS

Rule 34.

"An employe disciplined or discharged shall be given a hearing by the Master Mechanic, or his representative, if requested in writing, within five (5) days of receipt of request. Prior to the hearing such employe will be apprised of the precise charge against him and shall be permitted to have present the necessary witnesses, and shall have the right to be there represented by his local committee. If it is found that an employe has been unjustly suspended or dismissed from the service, such employe shall be reinstated with his seniority rights unimpaired, and compensated for the wage loss, if any, resulting from said suspension or dismissal.

(338) COMMITTEES

Rule 35.

"The Company will not discriminate against any committeeman, who, from time to time, represents other employes, and will grant them leave of absence and free transportation to any point on its line when delegated to represent other employes.

"NOTICES—POSTING OF

Rule 41.

"A place will be provided for each department where employes may post notices of interest to themselves, in a

location where employes may observe same in going to and from work. No notice will be posted without permission of the officer in charge at that point.

"MISCELLANEOUS—SCOPE OF GENERAL AND SPECIAL RULES

Rule 111.

"Except as provided for in the special rules of each craft, the general rules shall govern in all cases.

Rule 112.

"(a). The right of employes to be consulted prior to a decision of the Management adversely effecting their wages or working conditions is hereby agreed to. This right or participation shall be deemed adequately complied with if and when representatives of a majority of the employes of each of the several classes specified in this agreement shall have conferred with the Management.

"(b). Should either party to this agreement desire to revise or modify these rules, thirty (30) days' notice shall be given to the other party, a written statement containing the proposed changes shall be given and conference held at a time agreeable to both parties to negotiate to a conclusion.

"(c). This agreement supersedes all previous agreements, rules, practices and decisions thereon.

(339) Rule 113.

"This agreement shall become effective as of November 15, 1922, and shall continue in effect for one (1) year and thereafter until changed as provided for in Rule 112, or under the provisions of the Transportation Act of 1920.

For the Virginian Railway Company:

J. W. SASSER,
Superintendent Motive Power.

For the Mechanical Department Association of the Virginian Railway Company:

F. W. BILLMEYER,
Special Chairman Machinists.

L. E. CAMPBELL,
System Chairman Boilermakers.

E. W. DOVE,
System Chairman Blacksmiths.

C. R. BILLMEYER,
System Chairman Sheet Metal Workers.

G. W. ST. CLAIR,
System Chairman Electricians.

CHARLES HELVY,
System Chairman Carmen.

Approved:

C. H. HIX,
Vice-President."

Defendant's Exhibit "S" being a bulletin dated Janu-
(340) ary 20th, 1934, issued by J. W. Sasser, is set out on page 180.

(341) **DEFENDANT'S EXHIBIT "T"**

THE VIRGINIAN RAILWAY COMPANY

NOTICE TO EMPLOYEES IN ACCORDANCE WITH RAILWAY LABOR ACT APPROVED JUNE 21, 1934.

The Virginian Railway Company hereby gives notice that all disputes between the Railway Company and its employees will be handled in accordance with the requirement of the Railway Labor Act approved June 21, 1934, the Third, Fourth and Fifth Paragraphs of Section 2 of said Act reading as follows:

Third: "Representatives, for the purposes of this

Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives, representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier."

Fourth: "Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representatives of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions; provided, that nothing in this act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization."

Fifth: "No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor or-

ganization; and if any such contract has been enforced prior to the effective date of this Act, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way."

J. W. SASSER,
Superintendent Motive Power.

August 14, 1934.

(342) **DEFENDANT'S EXHIBIT "V"**

Princeton, August 16, 1934.
File

MR. TINDER:

MR. HALSTEAD:

Arrange to have the men in your different shops notified that the voting will begin at 2 o'clock, and the men should be notified and sent in as follows:

1st—Planing Mill and Wheel Shop

2nd—Coach and Paint Shop

3rd—Light repair Car Men

4th—Heavy repair car men

5th—Blacksmiths

6th—Machinists

7th—Boilermakers

8th—Pipefitters

9th—Electricians and Miscellaneous.

(S) J. W. SASSER,
Superintendent Motive Power.

JWS:N

(343) **DEFENDANT'S EXHIBIT "W"**

Princeton, West Virginia,

August 18, 1934.

NOTICE TO ALL CONCERNED

All eligible employees will be given a chance to vote between the hours designated and conforming to the bulletins of the Mediator, and under no conditions will the men be kept away from the polls for reasons of work assigned to them.

(S) J. W. SASSER,
Superintendent Motive Power.

(344) **DEFENDANT'S EXHIBIT "X"**

2m—12-12-23 Form 203

THE VIRGINIAN RAILWAY COMPANY

PERSONAL RECORD

All persons employed by this company will be required to answer the following interrogatories **in their own handwriting.** This blank when filled up and signed by employe must be forwarded to person employing them with any letters of recommendation such employe may have, a record of which will be made and letters returned.

----------Station ----------, 19----

1. Name in Full (No Initials)----------
2. Age? ----------
3. Married or Single? ----------
4. Where Born? ----------
5. Where does Your Family or Nearest Relative Live?
   No.------ Street---------- Town or City--------
   State of---- What is His (or Her) Name?----------
6. How Many Years Experience in Railway Business?---

7. Ever Injured? If so on What Road and Extent of Injury? _____
8. In What Business Before Entering Railway Service? _____
9. Name All Roads on which You have been Employed. In what Length of Service in Each, Including Service with This Company and Cause of Leaving Each:

Railroads	Station or Division	Capacity	During What Time From	To	(CAUSE OF) (LEAVING.) (If not sufficient) (space here) (use reverse) (side)

10. If You have been Employed Before on any Division of This Road or Branches, State Which One, When and in What Capacity? _____
11. On What Road Last Employed? _____
Cause of Leaving? _____
12. Number of Letters of Recommendation Enclosed? ___
13. When did you Commence Service for This Company? _____
14. Present Occupation? _____
15. In order that the Virginian Railway Company may be fully informed as to my Personal Character and my Qualifications for the position for which I have made application, I refer to each of my former employers, and request and authorize each of the said Companies, for whom I have formerly worked, to give to the above Company all information they may be in possession of; whether shown by my personal record or otherwise, as to my personal character and also my qualifications for the position I have herein applied for, and the reason why I was discharged or quit service, upon any inquiry that may be made of them, or either of them, by said Virginian Railway Company.

Signature _____

Witness _____

(345) **OPINION OF THE COURT**

Filed July 24, 1935.

(Style of Court and Title omitted.)

This is a suit by System Federation No. 40, Railway Employees Department of the American Federation of Labor, and others, against the Virginian Railway Company, seeking to enforce certain rights and praying for certain relief under the Railway Labor Act, as amended June 21, 1934, (USCA Title 45, Sec. 151, et seq. 1934 Supp. pp. 79-83). For convenience complainants will be referred to herein as the Federation, the defendant as the Railway, the Mechanical Department Association of the Virginian Railway as the Association, the Independent Shop Crafts Association of the Virginian Railway as the Independent, and the National Mediation Board as the Board.

The beginning of the controversy between the Railway and its Shop Craft employees, which has resulted in this (346) litigation, dates back prior to July 1, 1922, and unfortunately a decision of the case involves the necessity, it seems to the Court, of stating the material facts covering the dispute which has thus extended over a period of 12 years or more.

THE STRIKE OF JULY 1, 1922.

Prior to July 1, 1922, the employees of the Railway were affiliated with the American Federation of Labor. On that date, following the refusal of the Federation to accept certain reductions in pay under an order of the National Railroad Labor Board, which Board was organized pursuant to the provisions of the National Transportation Act of 1920, the members of the Federation in the Mechanical Department of the Railway went on strike. As a result of the strike when interference with the operation of trains in interstate commerce became acute, the Railway applied for and was granted injunctions by the District Courts of the Western District of Virginia and Southern District of West Virginia, pro-

hibiting the Federation, its officers, agents, and members, from interferring with the employees of the Railway in the performance of their duties, or with the operation by the Railway of its trains in interstate commerce.

ORGANIZATION OF THE MECHANICAL DEPARTMENT ASSOCIATION OF THE VIRGINIAN RAILWAY COMPANY.

On July 3, 1922, the United States Railroad Labor Board adopted a resolution calling upon the employees of carriers generally to organize themselves into associations for the purpose of collective bargaining with respect to matters pertaining to rates of pay, rules, and working conditions. On October 1, 1922, the Mechanical Department employees of the Railway formed the Mechanical Department Association of the Virginian Rail-
(347) way (which Association is hereinafter referred to as the Association) and adopted a written constitution and by-laws. Thereafter, the Association through its general chairman and representatives of the different crafts of said Association entered into a contract with the Railway, dated November 15, 1922, to become effective as of November 15, 1922, and to remain in force one year, and thereafter until changed by the authorized representatives of the respective parties. The Association was kept alive by the election every two years of local committeemen and a chairman of each craft. The chairman of the six crafts constituted the system committee which in turn elected a general chairman. The Association continued thus to function from the date of its organization to October 3, 1933, the date the committees of the different crafts, the chairman of each and the general chairman were elected. As already noted a form of contract between the Association and the Railway was entered into covering matters pertaining to rates of pay, rules, and working conditions. This contract provided for the establishment of a system board of adjustment consisting of an equal number of representatives on behalf of the Railway and the Association, which board of adjustment was to be final authority for the settlement of grievances and disputes arising with respect to said subject matter of the contract. The rela-

tions of the members of the Association so far as it functioned and the Railway seem to have been amicable up to 1927. At that time the Federation became active in its efforts to establish an organization among defendant's employees.

With respect to the formation and activities of this Association the testimony reveals that no employee knew just how or when he became a member thereof, (348) that no dues were ever assessed or paid by members, that meetings were held only once every two years and then apparently for the sole purpose of electing officers and committeemen, that the notices of the elections were sent out from an office of the Railway, that all expense incident to the organization and maintenance of the Association was defrayed by the Railway, and that no substantial grievances were ever taken up by the Association representative with the Railway.

FACTS LEADING UP AND INCIDENT TO THE DISPUTE IN QUESTION WHICH RESULTED IN THE INVOCATION OF THE SERVICES OF THE NATIONAL MEDIATION BOARD.

As already stated, the Federation became active through its agents and organizers in 1927 and this activity finally culminated in the formation of a local organization. The activities of such organization may be summarized as follows: (1) A letter was sent by B. M. Jewell, President of System Federation No. 40, dated March 7, 1934, to the Railway stating that he had been authorized to represent the different shop craft employees of the Railway, and requesting that the letter be accepted as authority for him to represent the crafts. This authorization was not accepted or recognized by the Railway. Prior to April 13, 1934, the Federation invoked the services of the Board of Mediation as constituted under the Railway Labor Act of May 20, 1926, (USCA Title 45, Sec. 151 et seq.); and the Railway was notified by letter, dated April 17, 1934, that the services of the Board had been invoked. The Railway advised the Board by letter dated April 24, 1934, that the Federation did not represent the employees involved, that no dispute existed, and that the services of the Board

were not required. However, on June 4, 1934, after having taken jurisdiction of the matter, the Board sent a (349) Mediator to Norfolk for the purpose of settling the dispute. The Railway accepted the Board's offer of mediation, and the Board sent H. H. Reed, another Mediator to Norfolk on July 5, 1934, to determine whether or not a majority of Railway's mechanical department employees had authorized the Federation to represent them. At that time a conference was held by Mediator Reed with one Duffey representing the Federation and representatives of the Railway which resulted in arrangements being made for checking authorizations held by the Federation against the Railway's pay rolls for the first half of April, 1934, and also in an agreement that these authorizations should embrace the classes of employees set forth in letter dated March 7th, 1934. This check was commenced on July 6, 1934, but before completion Duffey, representing the Federation, notified Mediator Reed that he desired to withdraw the firemen and oilers, roundhouse and shop laborers from the list included in the letter and the request for Mediation made to the Board, to which withdrawal protest was made by defendant, but the Board permitted these employees to be withdrawn. Further check under this revised arrangement was concluded on July 16, 1934, with the result that the Federation held authorizations from 408 employees out of a total of 845 excluding firemen and oilers, shop and roundhouse laborers, and 1058 if the latter were included. The Board took no further action on that check. On August 10, 1934, the Railway received a telegram from the Board, created pursuant to the Railway Labor Act *as amended*, advising that it had accepted a request from the Federation to investigate and certify representatives of the mechanical department employees of the Railway, against which action the Railway protested. Pursuant to this notification R. B. Bronson, Mediator, was sent to Norfolk on August 13, 1934, to investigate. On August 14, (350) 1934, a conference between Mediator Bronson, C. L. Bentley, representing the Federation, J. W. Sasser, Superintendent of Motive Power, and L. A. Markham, Assistant to the President of the Railway, was held and resulted in the selection of J. W. Munsey, General Chairman of the Association, as representative of the Associ-

ation by the Board. This selection of Munsey apparently was over the protest of Mediator Bronson, because at that time Munsey was identified with and active in the Federation. C. L. Bentley insisted upon the selection of Munsey. At this conference a written agreement was prepared by Mediator Bronson and entered into by the above representatives, setting forth the rules and regulations governing the election to be held on August 16, 1934.

STATEMENT TO THE MEMBERS OF MECHANICAL DEPARTMENT ASSOCIATION OF THE VIRGINIAN RAILWAY COMPANY ON EMPLOYEE REPRESENTATION, ISSUED BY J. W. SASSER, SUPERINTENDENT OF MOTIVE POWER AND DATED JULY 11, 1934, WITH THE APPROVAL OF THE RAILWAY.

This statement, after setting forth the purposes of the Railway Labor Act of 1926, said:

"Statements have been made in the press and elsewhere, in many instances with a purpose, that the Amendment to the Railway Labor Act has abolished Company Employee Unions. There is nothing in the Amendment to the Act which prohibits Company Unions, nor the right of such Unions to designate representatives of their choice for the purpose of conferring with representatives of the carrier.

"Let it be understood at the outset that the Management of The Virginian Railway Company is in no sense opposed to the principle of collective bargaining, and has practiced it for years. It not only accepts the principle and entirely approves of it, but does not believe that any dispute can be settled with the same degree of success or of satisfaction where one side of the controversy has no interest in the property and has no familiarity with the problems involved, which only an employee can have.

"Recent persistent efforts of the American Federation (351) of Labor seeking authorization from members of the Mechanical Department Association of The Vir-

ginian Railway Company to represent the members in future conferences with representatives of The Virginian Railway Company, makes it necessary for the Management to present to its employees who will be affected a plain statement of facts in connection with the proposed change. Before the members of that Association shall act each member owes it to himself that he should give due consideration to some of the facts involved in the proposed change from Company Employee Representation to National Organization Representation. When such consideration has been given, the employees and members of that Association are entirely free to exercise their choice of representatives free from fear or favor from their employer.

"Since its organization in 1922 the Mechanical Department Association of The Virginian Railway Company has, in pursuance of its agreement which has stood the test of years, worked out without friction all questions that have arisen between them. The relations between the Company and the members of the Association are harmonious and the arrangement has proved satisfactory. The mutual acquaintance of representatives of the employees and of the Management, the knowledge of the property and the interest of the men in it creates a condition which is most desirable. None can fail to appreciate the seriousness of changing a condition which has proved so satisfactory in the past.

"It will hardly be denied by any of its members that the chief object of the American Federation of Labor is eventually to bring about the closed shop in industry, thereby regimenting labor and reducing the individual to a mere cipher with little or no influence in the management of his local Association.

"On July 1, 1922, practically all of the Mechanical Department employees of The Virginian Railway Company affiliated with System Federation No. 40, Railway Employees Department, American Federation of Labor, went on strike. This action resulted from a strike order issued by the executives of the organizations comprising the Federated Shop Crafts. This course, as is well known, proved disastrous to the organizations and unfortunate to the men composing them.

"On July 3, 1922, the U. S. Railroad Labor Board issued a circular suggesting that the employees remaining in the service and the new employees succeeding those who left the service take steps as soon as practicable to form such an Association or Organization as might be deemed necessary to function in the representation of the employees before the Board. In line there-
(352) with, on October 1st, 1922, the shop employees of The Virginian Railway Company organized the Mechanical Department Association, with which all past negotiations pertaining to rates of pay, rules and working conditions, have been conducted. For the past year an attempt has been made to discredit in every manner this Association (commonly called Company Union) by professional representatives of organized labor in an effort to have its members authorize the Railway Employees Department, American Federation of Labor, to represent them in negotiations with the Railway Company rather than the Mechanical Department Association, which has represented them successfully for the past twelve years. And it has come to the attention of the Management that as an inducement for representation by American Federation of Labor promises of increased rates of pay and other matters have been made that cannot be fulfilled. Prior to the strike of 1922 there was continued dissention that frequently resulted in strikes without a single benefit, but did result in great loss of wages to the employees. For twelve years perfect harmony has prevailed. There have been no strikes and disputes have been promptly adjusted with satisfaction. It will be recalled that the Management in its negotiations with the representatives of the organization has time and again stated that it would be fair and impartial in its dealings with its members and would provide as good working conditions and as high rates of pay as was given by any other railroad, and it is known that this promise has been carried out, and that the same policy will be continued.

"In the depression period from July, 1932, to July, 1933, at the Huntington, West Virginia, shops on the Chesapeake and Ohio Railway the men averaged 9.1 days per month with a greatly reduced force, while on The Virginian Railway at the Princeton shops the men averaged 12 days per month with practically a full force, or

in other words the Virginian man worked 31.8% more than the men on the Chesapeake and Ohio.

"If the employees of the Company desire to affiliate with the National Organization they are free to do so. Such a course will, it is believed, and the past has so shown, result in differences and controversies between the Company and non-employee representatives, which would be avoided if there is a mutuality of interest and a relationship that has in it something of a personal nature. The Mechanical Department Association is founded on the basis of harmony, and it is the desire of the Management that this harmonious relationship shall continue.

"The above statement is made so that each member of the Mechanical Association and those employees who are not members may give careful consideration to all matters entering into the question of representation by (353) employees of the Company on the one hand or on the other hand by representation by members of the American Federation of Labor.

"The Management therefore hope that each man for himself will, before acting, give careful thought to the subject of representation."

This statement was signed by Mr. Sasser, and its circulation to employees of the Railway arranged by him. Sufficient copies were sent to various points on the Railway and turned over to officers of the Association, to be distributed to all employees in the various departments of the Railway which include the crafts here involved. The circulation occurred shortly after July 11, 1934, the date of the circular, and at a time when a Mediator was on the Railway's premises endeavoring to adjust the controversy with reference to representation. As one reason for issuing and distributing this statement, the answer of the Railway charges that its employees were being coerced by representatives of the Federation, at the time, but no proof of such alleged coercion of any of the employees was submitted nor was any investigation ever made with respect to the alleged complaints before the issuance of the above statement by Mr. Sasser.

THE ELECTION.

As before stated, a conference was held by Mediator Bronson with the representatives of the Federation and the Superintendent of Motive Power and the Assistant to the President representing the Railway, which resulted in the selection of J. W. Munsey, General Chairman of the Association, as the representative of that organization in the election to be held. A written agreement was entered into by these representatives setting forth the rules and regulations for an election by secret ballots to be held at Princeton, West Virginia, and other points on the road, on August 16, 1934. This agreement (354) provided that the representatives of the six shop crafts should be determined by *a majority of the total Votes shown on the eligible list of votes for the respective crafts.* It does not seem necessary to go into detail as to this election. After the first day at Princeton, Bentley, representing the Federation, protested the election to the Mediator in charge on the ground that the Railway was influencing the men not to vote. The Mediator declined to interfere and Bentley protested to the Board in Washington also, in consequence of which protest a new election was ordered to be held at Princeton on August 20, 1934, and at other points on the road on subsequent days. It was further ordered that the new election should be held under a rule providing that *a majority of the legal votes cast* by the six separate shop crafts should determine the representatives of the respective crafts. The change in this rule was protested on the alleged grounds that the rule was at variance with the one agreed upon for the election of August 16, 1934, and was also contrary to the provision of Section 2-fourth of the Amended Railway Labor Act (USCA Title 45, Sec. 152) which provides: "*The majority of any craft or class of employees shall have the right to determine who shall be the representatives of the craft or class for the purposes of this Act.*"

Based on the election the National Mediation Board issued its certificate under date of September 13, 1934, certifying System Federation No. 40 as the representatives of *all six crafts* of the Railway's mechanical department employees. This certificate will hereafter be more fully discussed. A majority of all the eligible voters in each

of the six crafts involved, save one, voted; in four of the crafts, namely, the Machinists, Sheet Metal Workers, (355) Electrical Workers and Boilermakers, a majority of all the eligible voters favored the Federation; in the case of the Blacksmiths, a majority of all eligible to vote, voted, but the Federation received only a majority of the votes actually cast, while in the case of the Carmen and Coach Cleaners less than a majority of all eligible, voted, but the Federation received a majority of the votes actually cast by that Craft. See Foot Note 1.

Bulletins in accordance with the provisions of the agreement were posted prior to the election under supervision of the Railway through J. W. Sasser, Superintendent of Motive Power, who was present at the different points on the road during the election but not present at the polls while the employees were actually voting. Private booths, voting places, ballot boxes, ballots, and the necessary equipment were all arranged by him at each voting place to assist the Mediator in conducting the election, and the Mediator was assisted by said Munsey and Bentley as silent observers.

Munsey was a member of both the Association and the Federation but that fact was generally known by the members of the six crafts as well as by the Railway through Mr. Sasser. The latter was aware of Munsey's affiliation with the Federation as long as nine or ten months prior to the election, and also prior to the time he, Sasser, notified Munsey that he had been selected as (356) observer to represent the Association in taking the vote. The election was fairly and honestly conducted, after due notice to all entitled to participate therein. All employees eligible to vote who desired to do so had full opportunity to vote.

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1. The vote was as follows:

	Eligible	For Federation	For Association
Sheet Metal Workers	52	37	9
Carmen and Coach Cleaners	266	98	20
Machinists	267	141	41
Blacksmiths	46	22	8
Electrical Workers	114	80	11
Boilermakers	79	51	9
TOTALS	824	429	98

The testimony of two witnesses, Nelson, called by complainants, and Nevins, by the Railway, with respect to a certain conversation had between the two immediately before the election is conflicting but important. The appearance and demeanor of the two witnesses on the stand and a study of their testimony has led the Court to give credit to Nelson's testimony with respect to what was said by Nevins in the conversation referred to. Nelson had been working for the Railway ten or twelve years at Victoria, Virginia, for the most part as "carman helper" at helpers' rate of pay. Nevins, the other witness referred to, was then and is still employed by the Railway Company as Master Mechanic at Victoria.

Nelson testified, in substance, that Nevins, the Master Mechanic, came to Nelson's home the evening prior to the election and that the question was brought up about the election to be held the next day; that Nevins told him that if the Road went into the American Federation of Labor, Victoria would be nothing more than a corn field, that the Railway had been talking about cutting out Victoria for a long time and it was on account of the loyal men at Victoria that the shops remained there, that Nelson would not be working for the Company thirty days if it went into the Federation, and that he, Nevins, felt just like telling the men those things if he had to go to Atlanta Prison or anything like that, for telling them. Nelson testified that on account of this conversation he did not vote for the Federation in the election. (357) There was also substantial testimony with respect to the conduct of the general car foreman in the Railway Shops at Elmore, West Virginia, sometime subsequent to the election, which conduct in the light of all the circumstances also indicates a purpose on the part of the General Car Foreman to influence the men in the shops to affiliate with the Independent (the Company Union) rather than with the Federation.

ORGANIZATION AND ACTIVITIES OF THE INDEPENDENT SHOP CRAFTS ASSOCIATION

This organization appeared shortly after the certification by the Board (September 13, 1934) of the results of the election. In some respects the Independent functioned to a greater extent than did its predecessor, the

Association. The members signed applications for membership, paid dues, formulated and adopted a constitution (December, 1934) held meetings and elected officers. It also appears that in the autumn of 1934 and the early part of this year the Federation representatives named pursuant to the election were endeavoring to make appointments for conferences with the Executives of the Railway but that the latter either failed to grant such requests for appointments or where appointments were made simply disregarded and failed to keep them. The failure of the Railway in some instances to make and in others to keep appointments to confer with the Federation representatives is mentioned at this time because it throws light upon the purpose of the organization of the Independent and the determination by the Railway not to recognize the Federation representatives although it never, prior to the institution of this suit, unequivocally and openly asserted that the election was not valid.

The apparent organizer of the Independent was H. C. Hearne, an employee in the car department. Hearne was chairman of the carmen for the Roanoke division in (358) the Association at the time he organized the Independent. He also protested the election on the ground, among others, that Munsey, the silent observer designated to represent the Association, was also a member of Federation No. 40. Later when carrying the protest to the Board in Washington Hearne was accompanied or joined there by counsel for the Railway. Hearne, after organizing the Independent, became its General Chairman although at that time his term of office in the Association had not yet expired. These facts are referred to because of their bearing upon the question whether or not the Association and the Independent ever had any real existence separate and apart from the Railway's control. The indications from his action and testimony are strongly to the effect that Hearne in organizing the Independent was not in good faith representing the crafts but was in fact acting at the behest of the Railway. And upon the whole case the evidence indicates unmistakably that the real contestants in the election were the Federation and the Railway, that such is the situation in the controversy involved in this litigation, and that the parts played by the Association and

the Independent in those contests have been very largely that of mere figureheads.

CERTIFICATION OF THE NATIONAL MEDIATION BOARD ISSUED SEPT. 13, 1934, CERTIFYING THAT FEDERATION NO. 40 WAS THE DULY AUTHORIZED REPRESENTATIVE OF EMPLOYEES HEREIN INVOLVED.

The services of the Board were invoked on August 10, 1934, and the certification was made on September 13, 1934, four days after the expiration of the thirty day period prescribed by the statute, which provides that "it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the (359) name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier".

This provision of the statute would appear to be directory rather than mendatory so that the election is not rendered void merely because the certification was made after the expiration of the thirty days. While such failure might subject the Board to criticism it is hardly sufficient to invalidate an election otherwise valid. That part of the act prescribed a duty rather than a limitation upon the powers of the Board.

It is also contended by the Railway that the election is void because one of the rules under which it was held was in violation of the act which provides, among other things, that the "*majority of any craft or class* of employees shall have the right to determine who shall be representative of the craft or class" etc. It seems to me that this defense also is without merit. A reasonable interpretation of the Act is that the election must be open to each craft or class with full untrammelled opportunity to each eligible employee in such craft, to vote although he is not compellable to exercise that right. The statute is similar, it would appear, to statutes or by-laws providing that a majority of the stockholders of a corporation shall constitute a quorum at a stockholders' meeting.

Where such quorum is actually present at a duly called meeting, a majority of those may transact all business of the Corporation that may properly come before the stockholders unless the statute or by-laws expressly require a greater number of affirmative votes than a mere majority of the quorum. In this case, in every instance except one, more than a majority of those eligible to vote, actually (360) participated in the election; that is, exercised the right to determine who should represent that craft or class in negotiating with the Railway in respect to certain matters. That, it seems to me, meets all the requirements of majority rule in the five crafts where a majority of all eligible, actually voted, although in one of those instances less than a majority of all eligible, voted for the Federation. But in the craft (carmen and coach cleaners) where less than a majority of those eligible to vote, actually voted, it would seem to follow that there was no election by that craft, and as to that craft the certificate of the Board is without force or effect.

As above stated, J. W. Munsey, who was chosen as the representative of the Association in the election held in August, 1934, was also affiliated with and active in organizing the Federation among the employees of the Railway, so that at the time he acted as silent observer for the Association, he was a member of both the Association and Federation. If his membership in the Federation had been kept secret or if there were any substantial evidence tending to show that the election was unfair or tainted in any way with fraud or with misconduct on his part, the Court would be disposed to treat this dual membership as being of far greater importance than it does treat it under the circumstances disclosed. But there is a complete lack of any evidence or intimation that the election was unfair, dishonest or improperly conducted in any respect or that Munsey was guilty of any misconduct. On the contrary, all the testimony on that subject shows that the election was fairly and honestly conducted and that everyone entitled to vote had full opportunity to exercise that right without hindrance or interference by the Federation or any one connected with it. Furthermore, the affiliation of Munsey with the Federation was generally known to both the Railway and the members of the Crafts involved, long before the election. For instance, it appears from the testi-

(361) mony that as early as November, 1933, Munsey applied to Mr. Sasser for leave to post notices on the Railway bulletin boards for the purpose of calling the men together looking to the formation of an organization affiliated with the Federation.

The only point made against Munsey is that he consented to the change made in the Rule with respect to the majority required. While the rule as changed was in conflict with the act in that the act requires *a majority of a craft or class* to determine who shall represent it and the rule as changed merely required a majority of those voting to make such determination, the results are the same as they would have been had the rule not been changed. In other words, that particular phase of the election was covered by an express provision of the act itself and any attempt to change it was simply without effect. To the extent that the election complied with the requirements of the act it should be upheld, but disregarded where it did not meet those requirements; that it to say, a majority of all eligible in each of five of the crafts, actually voted, and as applied to those crafts the election was valid and binding, but in the case of the carmen and car cleaners less than a majority of the eligibles voted, so that as to that craft there was no election.

NATURE OF THE WORK PERFORMED IN THE RAILWAY SHOPS AT PRINCETON, WEST VIRGINIA.

A large percentage of the Railway employees in the six crafts referred to work in the back shops at Princeton, West Virginia. It is contended by the Railway that the operations in those shops are purely intrastate, and that the relation of such work to the interstate transportation carried on by the Railway is too remote for interruption (362) or cessation of such shop work even for long periods to directly affect interstate commerce. The testimony with respect to the work in the Princeton Shops may be summarized as follows:

The Roanoke division of the Railway has been electrified in recent years as a result of which there has been a change in the operation of trains. Prior to elec rifi-

cation Princeton was a terminal and trains were operated by steam from Princeton to Roanoke, Virginia, and to Elmore, West Virginia; that is, Princeton was a division point and running repairs were made there, but since electrification running repairs are made at Elmore and Mullens, West Virginia, and Roanoke, Virginia. At Princeton 322 men are employed doing classified repairs, one only of which number is engaged in making running repairs. In addition to the 322 employees referred to, but not included in that number, are 20 men employed in the Car Department engaged in making running repairs. The Classified repairs (back shop work) done by the 321 employees is heavy repairs on locomotives and cars such as rebuilding and putting them in shape for months of service. To make such repairs it is necessary to withdraw the cars and engines from service, and this work usually requires an average time of about 105 days for locomotives and 109 days for cars. In addition to classified repairs a great deal of store work is performed in these shops. Store work consists of manufacturing material which is placed in the stores to be issued out at different points along the railway. Practically all the repair parts for outlying points on the railway are thus made in the Railway shops, because they can usually be manufactured there more cheaply than the railway can buy them, but where the Railway can procure such parts more cheaply in the market it purchases them.

Princeton is not a terminal point, but on the average (363) 1200 to 1400 foreign cars (cars owned by other railroads) per month are either cleared or pass through Princeton over the Railway's lines. If such cars are so badly damaged as to require heavy repairs the work is done at Princeton, and any emergency repairs are made there if the need is discovered but cars are not inspected at Princeton. The repair work at Princeton is for the use of the Railway to take care of the equipment used in carrying the ninety-seven percent of interstate commerce. In brief, the work done there by these crafts is similar to that done in railway machine shops generally.

During the trial it was admitted that approximately 97 per cent of all the transportation performed by the

Railway is interstate. While this estimate is approximate only the true figure if ascertained would probably vary only slightly from the estimate, since it is a matter of common knowledge that the business of the Railway consists very largely in transporting coal from the mines in West Virginia to the Railway's deep water terminal at Norfolk, Virginia.

That the operations conducted in the shops at Princeton are purely intrastate is not, it seems to me, seriously debatable, and if the matter was controlled by that fact alone I should not hesitate to hold that the Board was without any authority or jurisdiction over the relations between the 321 employees performing back shop repairs and the Railway. However, the decision of the question as to whether or not the Railway Labor Act as amended in 1934, can validly be applied to the relationship between these employees and the Railway depends upon the character of the relation of the shops and the work performed there to the Railway considered as a whole and as an instrumentality of interstate commerce. That this Railway is more completely such instrumentality than almost any other railway of its size in the coun-
(364) try is apparent.

It will also be seen from the evidence that when these shops are in operation at approximately their full capacity, there is, so to speak, a stream of engines and cars passing through them, out of and back into interstate transportation activity. And while it is true that engines and cars repaired or rebuilt there are frequently out of service for comparatively long periods (the average being 105 and 109 days, respectively) I have no serious doubt that if the operations in the shop were suspended by a labor dispute for any considerable length of time, the interstate transportation service of the Railway would be seriously hampered or interrupted and if the suspension in the shops continued very long that such interruption would very seriously cripple its interstate transportation operations. The effort of the Railway to show that these shops are not necessary to the conduct of its transportation activities was not impressive. While the operation of the shops by the Railway is not absolutely necessary, for the reason that the Rail-

way could probably have the work, in large part at least, done by independent contractors, it has nevertheless chosen to do the work in its own shops, which is the only practical method of keeping such important operations under its immediate control. In that way it avoids the chances of being embarrassed by delays and other troubles beyond its control and the consequent danger of interruption of its transportation business. Furthermore, the idea of separating the employees of a common carrier whose business is so overwhelmingly interstate in its nature, into two classes, one subject and the other not subject to the provisions of the Act of Congress, when their work is so closely and intimately related, does not make a strong appeal to the Court. The sounder and better view would seem to be to regard the railway with all of its activities, as a single instrumentality of inter- (365) state commerce. When it is thus viewed, it seems clear that serious interruption or suspension of the work in the shops would very probably directly and immediately adversely affect interstate commerce. In Schechter Poultry Corporation v. U. S., 55 Sup. Ct. Rep. 837, at page 849, it is said:

"The power of Congress extends, not only to the regulation of transactions which are part of interstate commerce, but to the protection of that commerce from injury. It matters not that the injury may be due to the conduct of those engaged in intrastate operations. Thus, Congress may protect the safety of those employed in interstate transportation, 'no matter what may be the source of the dangers which threaten it.' Southern Railway Company v. United States, 222 U. S. 20, 27, 32 S. Ct. 2, 4, 56 L. Ed. 72. We said in Mondou v. New York, N. H. & H. R. Co. (Second Employers' Liability Cases), 223 U. S. 1, 51, 32 S. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44, that it is the 'effect upon interstate commerce,' not 'the source of the injury,' which is 'the criterion of congressional power.' 'We have held that, in dealing with common carriers engaged in both interstate and intrastate commerce, the dominant authority of Congress necessarily embraces the right to control their interstate operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to secure the freedom of that

traffic from interference or unjust discrimination and to promote the efficiency of the interstate service."

And the following reasoning from the opinion in Southern R. Co. v. United States, 222 U. S. 20, 56 L. Ed. 72, seems appropriate at this point:

"For these reasons it must be held that the original act, as enlarged by the amendatory one, is intended to embrace all locomotives, cars, and similar vehicles used on any railroad which is a highway of interstate commerce.

"We come, then, to the question whether these acts are within the power of Congress under the commerce clause of the Constitution, considering that they are not confined to vehicles used in moving interstate traffic, but embrace vehicles used in moving intrastate traffic. The answer to this question depends upon another, which is, Is there a real or substantial relation or connection between what is required by these acts in respect of vehicles used in moving intrastate traffic, and the object (366) which the acts obviously are designed to attain; namely, the safety of interstate commerce and of those who are employed in its movement? Or, stating it in another way, Is there such a close or direct relation or connection between the two classes of traffic, when moving over the same railroad, as to make it certain that the safety of the interstate traffic and of those who are employed in its movement will be promoted in a real or substantial sense by applying the requirements of these acts to vehicles used in moving the traffic which is intrastate as well as to those used in moving that which is interstate? If the answer to this question, as doubly stated, be in the affirmative, then the principal question must be answered in the same way. And this is so, not because Congress possesses any power to regulate intrastate commerce as such, but because its power to regulate interstate commerce is plenary, and competently may be exerted to secure the safety of the persons and property transported therein and of those who are employed in such transportation, no matter what may be the source of the dangers which threaten it. That is to say, it is no objection to such an exertion of this power

that the dangers intended to be avoided arise, in whole or in part, out of matters connected with intrastate commerce."

Again, Congress in the exercise of its paramount power may prevent the common instrumentalities of interstate commerce from being used in their intrastate operations to the injury of interstate commerce and thus may require the level of intrastate rates to be brought to the level of the interstate rates on the same commodities in order to prevent discrimination against interstate traffic. Houston, etc. R. Co. v. United States, 234 U. S. 342, 58 L. Ed. 1341, Alabama v. United States, 279 U. S. 229, 73 L. Ed. 675.

The basic theory of these decisions is the regulatory power over a carrier and its rate structure as a unitary implement of commerce "when the adequate maintenence of interstate commerce involves and makes necessary on this account the incidental and partial control of intrastate commerce, power of Congress to exercise such control has been established." Dayton Goose Creek Railway Case, 263 U. S. 456.

Broadly considered, therefore, it would be difficult for (367) the Courts to conclude either as a matter of fact or of law, that the segregation of a group of employees of a railroad from the remaining mass and their employment in work upon units of rolling stock withdrawn after all only for a time from use in interstate commerce, could remove that group of employees from the operation of the Railway Labor Act on the theory that their relationships with the company in the matter of bargaining concerning wages, hours and conditions of work, is unrelated to the general problem of the labor relationships of the railroad to the whole body of its employees.

As the Supreme Court has frequently pointed out, if legislation upon any subject is within the power of Congress, it is not the province of the Courts to set limits to the exercise of the power. Unless there is no substantial basis for the exercise of legislative judgment in respect of a subject matter generally within its power, its action will not be held to be arbitrary. Radico v. New York, 264 U. S. 294.

If, therefore, the act properly construed is broad enough in its provisions to include within its liberal and remedial purposes the relationships of the railroad with this particular group of employees, there can be little, if any, question of the power of Congress to do so. If I have correctly interpreted the contentions of the Railway, it admits that the Act of Congress is that broad and for that reason contends it is unconstitutional. Be that as it may it seems clear that the provisions of the Act are sufficiently broad and inclusive to warrant the interpretation that it was intended to apply to this and similar cases. With the exception of the question above discussed, all of the constitutional questions presented by the Railway's pleadings, have been resolved adversely to it by the Supreme Court in Texas N. O. R. Co. v. Brotherhood of Railway Clerks, 281 U. S. 548. In R. R. (368). Retirement Board v. Alton R. R. Co.,____U. S. ____, 55 S. Ct. Rep. 758, at page 771, it was said:

"The railway labor act was upheld by this court upon the express ground that to facilitate the amicable settlement of disputes which threatened the service of the necessary agencies of interstate transportation tended to prevent interruptions of service and was therefore within the delegated power of regulation. *It was pointed out that the act did not interfere with the normal right of the carrier to select its employees or discharge them. Texas & New Orleans R. Co. v. Brotherhood of Railway & S. S. Clerks*, 281 U. S, 548, 570, 571, 50, S. Ct. 427, 74 L. Ed. 1034." (Italics supplied.)

ARE COMPLAINANTS ENTITLED TO INJUNCTIVE RELIEF?

In conclusion it is earnestly contended by the Railway that no case has been made out by complainants to justify the court in granting any injunction, mandatory or otherwise, against it. And it is also said that the only affirmative relief which the Court upon any proper view of the case as presented, could grant would be one requiring the Railway to recognize and treat with the complainant, System Federation No. 40, and, in substance, that since the Railway and complainants cannot be required to make or enter into any contract or under-

standing with respect to hours of work, rates of pay or conditions of work, that to order the Railway "to recognize and treat with" complainants, would be to issue a vague, useless and impractical order contrary to the established practice of courts of equity.

It is further urged that the failure of Congress to attach any penalty to the refusal of a carrier to confer or recognize and treat with employee representatives, is highly significant. This latter contention refers particularly to Section 2, paragraphs Second, Sixth and Ninth of the amended Railway Labor Act. (USCA Title 45, Sec. 152, 1934 Amendments, pp. 710-712.) And examination of the Act as amended does disclose that the (369) penalties prescribed in the tenth paragraph of Section 2 are to be inflicted for "willful failure or refusal", "to comply with the terms of the third, fourth, fifth, seventh or eighth paragraphs of Section 2". The acts and omissions against which the complainants seek relief in the instant case are violative of the provisions of the ninth paragraph of Section 2. It is clear, therefore, that violation of the provisions of the ninth paragraph does not subject the Railway or its officials to any penalty prescribed by the Act. Notwithstanding that fact, the contention apparently presents no new or novel question for decision. In Texas N. O. R. Co. v. Railway Clerks, supra, 281 U. S. at 569, the Chief Justice, in disposing of a similar contention, said:

"In reaching a conclusion as to the intent of Congress, the importance of the prohibition in its relation to the plan devised by the Act must have appropriate consideration. *Freedom of choice in the selection of representatives on each side of the dispute is the essential foundation of the statutory scheme.* All the proceedings looking to amicable adjustments and to agreements for arbitration of disputes, the entire policy of the Act, must depend for success on the uncoerced action of each party through its own representatives to the end that agreements satisfactory to both may be reached and the peace essential to the uninterrupted service of the instrumentalities of interstate commerce may be maintained. There is no impairment of the voluntary character of arrangements for the adjustment of disputes in the imposition

of a legal obligation not to interfere with the free choice of those who are to make such adjustments. On the contrary, it is of the essence of a voluntary scheme, if it is to accomplish its purpose, that this liberty should be safeguarded. The definite prohibition which Congress inserted in the Act cannot therefore be overriden in the view that Congress intended it to be ignored. As the prohibition was appropriate to the aim of Congress, and is capable of enforcement, the conclusion must be that enforcement was contemplated.

"*The absence of penalty is not controlling.* The creation of a legal right by language suitable to that end does not require for its effectiveness the imposition of statutory penalties. Many rights are enforced for which (370) no statutory penalties are provided. In the case of the statute in question, there is an absence of penalty, in the sense of specially prescribed punishment, with respect to the arbitral awards and the prohibition of change in conditions pending the investigation and report of an emergency board, but in each instance a legal obligation is created and the statutory requirements are susceptible of enforcement by proceedings appropriate to each. *The same is true of the prohibition of interference or coercion in connection with the choice or representatives. The right is created and the remedy exists.* Marbury v. Madison, 1 Cranch 137, 162, 163." (Italics supplied.)

It is also urged that the evidence fails to present any case, which would justify the Court in granting injunctive relief in the face of the provisions of the Act of March 23, 1932, (29 USCA, Secs. 101, et seq.) limiting the jurisdiction of United States Courts to grant injunctions in labor disputes. That Act defines a labor dispute as follows:

"The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee."

And Section 107 of that Act prohibits any United States court from issuing an injunction in any case "involving or growing out of a labor dispute", until after a hearing such as was had in this case and except after finding of facts by the Court", to the effect:

"That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

"That substantial and irreparable injury to complainant's property will follow;

"That as to each item of relief granted greater injury (371) will be inflicted upon complainant by the denial or relief than will be inflicted upon defendants by the granting of relief;

"That complainant has no adequate remedy at law; and

"That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection."

It must be assumed, I think, from the facts found that this is a case "involving or arising out a labor dispute", and consequently governed in the matter of issuing an injunction by the provisions of said Act of March 23, 1932.

Does the evidence present a case which meets the requirements of that Act? It seems to me that this question must be answered in the affirmative. The Railway acting through its officers and agents, has persistently interfered with the shop craft employees in their efforts to organize for the purpose of collective bargaining, one of the principal objects if not the dominant object of the

Railway Labor Act. This unlawful interference and purpose to influence its employees has been evidenced chiefly through activities of the Railway in creating and promoting so called independent organizations, both before and since the election and by its fixed determination not to recognize or treat with the chosen representatives of the crafts unless they come from an organization under its control. In addition, I hardly think that any one can read with an open mind the Sasser statement referred to and quoted at length above without fairly concluding that it was printed and circulated to "use the authority and power" of the Railway "to induce action" by the members of the craft "in derogation of what the statute calls 'self organization' ". That it probably and naturally had the intended effect on many of those to whom it was delivered is no more than a rea-
(372) sonable inference to be drawn from the situation and power of the author over those to whom it was addressed. It is likewise clear that similar acts will be continued in the future to defeat or seriously interfere with self organization and representation unless prohibited. The right of self organization and representation in the matter of rates of pay, hours of labor, and working conditions is a property right, the loss of which would result in irreparable damage to complainants. Texas N. O. R. Co. v. Ry. Clerks, supra. Complainants have no adequate remedy at law to enforce that right, greater injury will undoubtedly be inflicted upon them by denial than upon defendant by the granting of relief, and the controversy is not a matter with which local public officials can deal. It involves rights granted by an Act of Congress and local public officials are without authority or power to protect or enforce such rights. Myers v. La. & A. Ry., 7 Fed. (Supp.) 92, 97.

It follows from what has been said that the complainants are entitled to an injunction, in substance, restraining the Railway, its officials, agents and representatives from in any way interfering with the complainants and the members of the crafts involved in the matter of self organization, and requiring the Railway to recognize and treat with the complainant, System Federation No. 40, as the representative of the five crafts in matters pertaining to rates of pay, hours of employment and work-

ing conditions. It is also the conclusion of the Court that the injunctive relief should be broad enough to prohibit the Railway in the future from fostering, encouraging or promoting the activities of the Mechanical Department Association of the Virginian Railway and the Independent Shop Crafts Association of the Virginian Railway or any similar organization, and requiring it as between System Federation No. 40 and other organizations, if any, to be and remain neutral and to permit all (373) of said crafts and the members thereof to exercise the right of self organization and representation without interference, influence or coercion by the Railway, its officials or representatives.

An order in accordance with the views herein expressed will be entered when presented.

LUTHER B. WAY,
United States District Judge.

July 24, 1935.

FINAL DECREE AWARDING INJUNCTION

(374) Entered and filed August 23, 1935.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

System Federation No. 40, Railway Employes Department of the American Federation of Labor, in its own right and as the actual and legally designated representative of all Machinists, Boilermakers, Blacksmiths, Sheet Metal Workers, Carmen, Coach Cleaners, and their respective Specialists, Apprentices, and Helpers in the employ of The Virginian Railway Company in the State of Virginia and West Virginia, et als, Complainants,

vs. In Equity

The Virginian Railway Company,
Defendant.

This cause came on this day to be heard upon the Bill of Complaint and exhibits therewith filed, the motion of the defendant to dismiss the Bill of Complaint, the Answer of the Defendant, and the testimony of witnesses on behalf of the complainants and defendant, respectively, given and taken in open Court, and upon the agreement of the parties at the close of the testimony that the cause be submitted to the Court for final determination, and was argued by Counsel.

Upon due consideration of the motion of the defendant to dismiss the Bill of Complaint upon the ground that the "Railway Labor Act" as Amended June 21st, 1934, is uncontitutional and void as violative of the commerce clause of the Constitution and of the Fifth Amendment to the Constitution of the United States, and other grounds set forth in said motion, the Court being of the opinion that said "Railway Labor Act" is a valid exercise of the power of Congress under the Constitution of the United States, doth so decide and doth overrule and deny the motion of the defendant to dismiss the Bill of Complaint.

It appearing to the Court that this is a suit of a civil (375) nature, which arises under the Constitution and laws of the United States, particularly under the Act of Congress of May 20, 1926, as amended June 21st, 1934, (Public Act No. 442, 73d Congress) and commonly referred to as the "Railway Labor Act", and the laws of the United States relating to interstate commerce and under the general equity jurisdiction of this Court, the Court DOTH FIND—

1. That the defendant is a Corporation existing under the laws of the State of Virginia, with its principal office in the City of Norfolk, engaged in the business of Interstate Commerce as a common carrier by Railroads.

2. That the complainant, System Federation No. 40, Railway Employes Department of the American Federation of Labor, is the duly authorized representative of the Mechanical Department Employes of the Virginian Railway, except the Carmen and Coach Cleaners of said Railway, having been designated as such by certification

by the National Mediation Board on the 13th day of September 1934, in accordance with the provisions of the Railway Labor Act, of which the defendant had notice as required by law.

3. The Court doth further find that the defendant, in violation of Section Two (2) of said Railway Labor Act, has failed to treat with said System Federation No. 40, Railway Employes Department of the American Federation of Labor, the duly accredited representative of the Mechanical Department employes, except as aforesaid, of the defendant in accordance with said certification of the National Mediation Board of September 13th, 1934.

4. The Court doth further find from the evidence that by means of personal interviews, posted bulletins and by the circulation of a pamphlet calling the attention of its Mechanical Department employes to the disadvantages attendant upon membership in a standard labor organization and the advantages of a company union, the defendant sought to influence its Mechanical Depart-
(376) ment employes against any participation in or association with a standard labor organization and thereby to maintain a mere nominal association or union supported wholly by the defendant, and in the further effort to prevent its Mechanical Department employes from exercising their free and untrammeled right to choose their own representative; that after the certification by the National Mediation Board on the 13th day of September 1934, of System Federation No. 40, Railway Employes Department of the American Federation of Labor, as the duly authorized representative, except as aforesaid, of the Mechanical Department employes of the defendant, the defendant, by and through its officers, agents and servants, undertook by means of the circulation of a petition or petitions addressed to the National Mediation Board to have the certification of the National Mediation Board aforesaid altered, changed or revoked so as to deprive its Mechanical Department employes of the right to representation by said System Federation No. 40, Railway Employes Department of the American Federation of Labor, so designated as aforesaid, and thereafter did cause to be organized the Independent Shop Crafts Association by individual Mechanical De-

partment employes by circulating or causing to be circulated applications for membership in said Independent Shop Crafts Association notwithstanding the certification as aforesaid by the National Mediation Board of said System Federation No. 40, Railway Employes Department of the American Federation of Labor, as the authorized representative of its Mechanical Department employes, all of which said acts were had and done in violation of said Railway Labor Act; and that the said defendant has at all times since the certification by the National Mediation Board of said System Federation No. 40, Railway Employes Department of the American Federation of Labor, continued and doth now continue by the means aforesaid, to endeavor to deprive its Mechanical Department employes of any and all right to independent representation for the purpose of collective bar- (377) gaining with the said defendant as aforesaid, in violation of the provisions of said Railway Labor Act.

THEREFORE THE COURT DOTH ADJUDGE, ORDER AND DECREE—

1. That the said defendant, by and through its duly authorized officers or agents, shall treat with said System Federation No. 40, Railway Employes Department of the American Federation of Labor, so certified as aforesaid, and exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of the defendant growing out of any dispute between the defendant and the Mechanical Department employes thereof.

2. That the defendant, its officers, agents and employes, be and they are hereby enjoined and restrained of and from, directly or indirectly, in any way, manner or form, or by any means whatsoever, interfering with, influencing or coercing any of its Mechanical Department employes with respect to their free and untrammeled right of selecting or designating their representative or representatives for the purpose of making and maintaining contracts with the defendant relating to

rules, rates of pay and working conditions or for the purpose of considering and deciding disputes between the Mechanical Department employes of the defendant, and the defendant, as well as for any and all other purposes of the Railway Labor Act; and the defendant is hereby further enjoined and restrained of and from directly or indirectly, attempting to organize or organizing, promoting, fostering or being in any wise, directly or indirectly, concerned with the organization, fostering, maintenance or encouraging any association, union, society, corporation or company of the Mechanical Department employes of the defendant with the intent or for (378) the purpose of in any wise interfering with the complainant, System Federation No. 40, Railway Employes Department of the American Federation of Labor, or any other person or persons or association which may be hereafter designated or chosen in the place and stead of said System Federation No. 40, Railway Employes Department of the American Federation of Labor, as aforesaid, in violation of the Railway Labor Act as approved June 21st, 1934; and the defendant is further enjoined and restrained from either directly or indirectly, preventing or discouraging its Mechanical Department employes from becoming or remaining members of the complainant Federation or of the crafts or local unions of which it is composed; and are further enjoined and restrained of and from, directly or indirectly, entering into any contract, undertaking or agreement of whatsoever kind concerning rules, rates of pay or working conditions affecting its Mechanical Department employes, save and except only with the complainant, System Federation No. 40, Railway Employes Department of the American Federation of Labor.

And it is further ADJUDGED, ORDERED and DECREED that the complainants herein do recover of the defendant herein their costs in the prosecution of this suit.

LUTHER B. WAY,
United States District Judge.

August 23rd, 1935.

ASSIGNMENT OF ERRORS

(379) Filed Oct. 9, 1935.

(Style of Court and Title omitted.)

Now comes the defendant in the above entitled cause and files the following assignment of errors, upon which defendant will rely upon prosecution of its appeal in said cause from the final decree entered herein on the 23rd day of August, 1935.

The District Court of the United States for the Eastern District of Virginia erred:

1. In holding that the Railway Labor Act is within the scope of the power of Congress under the Commerce Clause of the Constitution, although by its terms the act includes all employees of defendant whether engaged in interstate commerce or engaged solely in intra-state work which is not commerce.

2. In holding that the 321 of defendant's back shop employees at defendant's Princeton, West Virginia, shops who are engaged solely in intra-state work come within the purview and provisions of the Act.

3. In holding that said Act is constitutional and valid (380) under the Fifth Amendment to the Constitution of the United States, although by its terms the Act would destroy and interfere with defendant's right of liberty of contract, and destroy the equality of right as between employees and defendant of entering into contracts.

4. In holding that the certificate of the National Board of Mediation dated September 13, 1934, which was based on an election conducted in violation of the statutory rule, was valid and binding as to five of the six crafts in which a majority of the eligible voters participated in the election.

5. In holding that said certificate of the Mediation Board is valid, notwithstanding it fails to show on its

face the basic jurisdictional facts necessary to its validity.

6. In holding that the statement issued by John W. Sasser under date of July 11, 1934, was in violation of the said Act, and was not a lawful communication between employer and employee in the normal relations that existed between them and in failing to hold that the statement was within the exemption provided in the Norris-LaGuardia Act (29 U. S. C. A. Sec. 4 (o)), and further in failing to hold that said statement was in the exercise of the right of free speech guaranteed under the First Amendment to the Constitution.

7. In holding that the defendant be required to meet and treat with representatives of System Federation Number 40, American Federation of Labor, thereby depriving defendant of its right to liberty of contract, and when such requirement is meaningless unless the court can, under the law, require defendant to enter into a contract with said representatives.

8. In holding that an injunction should be granted which is so vague and indefinite as not to advise defendant with requisite certainty as to what it is required to do and not to do, and as to what it may do and may not do.

9. In holding that an injunction may be granted as (381) provided in said final decree when such holding violates the Norris-LaGuardia Labor Injunction Act, in that the facts found by the court do not justify the issuance of the injunction, and the material facts found by the court on which relief by injunction is based, are without support in the evidence.

10. In holding that defendant should be enjoined and restrained from entering into any contract or agreement of whatsoever kind concerning rules, rates of pay, or working conditions affecting its Mechanical Department employees, except only with the System Federation Number 40, Railway Employees' Department of the American Federation of Labor, in that such requirements vio-

late defendant's right of liberty of contract guaranteed under the Fifth Amendment to the Constitution.

11. In finding as a fact that no employee of defendant knew how or when he became a member of the Mechanical Department Association of the Virginian Railway Company, and that all expenses of organization and maintenance of said Association were paid by defendant, and further that no substantial grievances were ever taken up with defendant by representatives of said Association.

12. In finding as a fact that the pamphlet of July 11, 1934, issued by J. W. Sasser, Superintendent of Motive Power, was turned over to officers of said Mechanical Department Association, to be distributed by them to all of defendant's Mechanical Department employees.

13. In finding as a fact that no proof was submitted of threats, coercion, and undue influence used and exercised by representatives of said System Federation Number 40 of defendant's Mechanical employees to induce them to become members of said System Federation Number 40.

14. In finding as a fact that B. E. Nevins, defendant's (382) Master Mechanic at Victoria, used undue influence and coercion on one Thomas Nelson prior to the election held in August, 1934, and in holding in legal effect that defendant was responsible for the alleged acts of said Nevins, although there was no proof that defendant either authorized said alleged acts before they were committed, or ratified and approved said acts after they were committed.

15. In finding as a fact that defendant's Shop Foreman, Earnest M. Forbes, Elmore, West Virginia, used undue influence and coercion over employees in said shop working under him by the circulation of a petition for signatures of the men working under him certifying that they did not desire to become affiliated with the American Federation of Labor, and in holding in legal effect that defendant was responsible for the alleged acts of said Forbes, although there was no proof that

the defendant authorized said acts before they were committed, or ratified said acts after they had been committed.

16. In finding as a fact that defendant failed to meet and keep appointments with representatives of said System Federation Number 40, and that such failure on the part of defendant showed a purpose to promote the organization of Independent Shop Crafts Association then being organized, and also showed a determination on the part of the defendant not to recognize representatives of said System Federation Number 40.

17. In finding as a fact that defendant failed to meet and treat with representatives of said System Federation Number 40, when the uncontradicted evidence shows that defendant's representatives met with said System Federation Number 40 representatives on December 27, 1934, and that the representatives of said System Federation Number 40, submitted a contract to defendant's representatives, which contract defendant's representatives failed or refused to sign.

18. In finding as a fact that the defendant, prior to (383) the institution of this suit, never unequivocally asserted or claimed that the election held in August, 1934, was invalid.

19. In finding as a fact that H. C. Hearn was the sole organizer and moving spirit in the organization of the Independent Shop Craft Association, and that said Hearn, in so doing, was not in good faith representing the crafts, but was in fact acting at the behest of defendant.

20. In finding as a fact that the real contestants in the election held in August, 1934, were said System Number 40 and the defendant.

21. In finding that while the statutory rule requires a majority of the eligible voters of a craft or class to select representatives of the craft or class, the contract entered into by John W. Munsey on the 18th day of August, 1934, providing for a change of the statutory

rule so that a majority of the voters actually voting should determine the representatives did not effect the result of said election, and in holding that said contract did not invalidate said election in the five crafts in which a majority of the eligible voters actually voted.

22. In finding as a fact that the defendant, acting through its officers and agents, has persistently interfered with its shop craft employees in their efforts to organize for the purpose of collective bargaining.

23. In finding as a fact that the defendant, by persistent interference, posting bulletins, and the circulation of pamphlets, has sought to influence its employees in the choice of representatives, and to prevent them from exercising their right to choose representatives.

24. In finding as a fact that unlawful interference by defendant and its purpose to influence its employees is shown by defendant's activities in creating and promoting the so-called Independent Shop Crafts Associ-
(384) ation, both before and since the election, and is further shown by defendant's fixed determination not to recognize or treat with representatives of crafts unless they come from an organization under defendant's control, and further that defendant did cause to be organized the Independent Shop Crafts Association by individual Mechanical Department employees.

25. In finding as a fact that the statement issued by J. W. Sasser dated July 11, 1934, was printed and circulated to use the power and authority of defendant in an effort to coerce and influence defendant's employees in violation of the Railway Labor Act as amended.

26. In finding as a fact that acts similar to the said J. W. Sasser's statement will be done by defendant in the future for the purpose of defeating or interfering with the self organization and representation of defendant's employees, unless prohibited by an injunction.

27. In finding as a fact that the defendant has at all times before and since the issuance of the certificate of the National Mediation Board, continued and now con-

tinues to endeavor to deprive its Mechanical Department employees of the right to be represented by independent representatives of their own choice.

28. In refusing to adopt and hold the findings of fact and conclusions of law submitted by defendant and filed herein on the 29th day of June, 1935, which are as follows:

"FINDINGS OF FACT

"1: Complainant System Federation No. 40, Railway Employees' Association of the American Federation of Labor, hereinafter called the Federation is an unincorporated association of constituent unincorporated system craft associations, which system craft associations, in turn, are composed of local unincorporated craft associations of an undisclosed percentage of the employees in each of the six crafts or trades included among the Mechanical Department employees of The Virginian Railway Company. Six employees of the Railway Company are also named as plaintiffs, individually and as chairman of the respective system craft associations. The sole defendant is a common carrier by railroad in interstate and intrastate commerce.

"2. Prior to July 1, 1922, defendant's mechanical (385) employees were members of and represented by System Federation No. 40, of the American Federation of Labor. On the date last named the said American Federation of Labor called a nation-wide strike of railway shop crafts employees and pursuant thereto most of defendant's mechanical department employees quit work. Thereafter, by acts of violence, threats, and otherwise, members and agents of the American Federation of Labor sought to coerce employees who had remained at work to quit defendant's employ, and to prevent others from taking the place of the strikers, and interfered with defendant's operations in interstate commerce. Defendant obtained injunctions from two Federal District courts enjoining the commission of such acts as above described, and other acts addressed to the same purpose.

"3. As a result of strike conditions, the Railway Labor Board called upon railroad employees to organize system associations for collective dealings with their respective employers, and the employees in defendant's mechanical department, without interference by the defendant, organized on October 1, 1922, the Mechanical Department Association of The Virginian Railway Company, hereinafter called the Association. After negotiations a contract between the defendant and its mechanical department employees, composed of machinists, boilermakers, blacksmiths, sheet metal workers, electricians, carmen, and apprentices and helpers of all, represented by the Association, was entered into on November 15, 1922, fixing the rates of pay, rules, and working conditions of all the said employees, and providing for the handling of grievances by local committees and system boards of the Association. The contract continued in effect to the time of the hearing. There is no evidence that defendant established the Association, interfered with its actions, or directed or attempted to direct its policies or the selection of its officers. Officers were regularly elected by the Association, and its committees and boards represented the mechanical department employees in the handling of grievances with defendant's officials until the latter part of 1934, when as the result of the fact that the General Chairman of the Association and others of its officers had become active members of the plaintiff Federation, the Association became inactive and was succeeded by Independent Shop Crafts Association, organized by, and composed largely or wholly of, members of the old Association, and at the time of the hearing having in excess of 400 members.

"4. Throughout the active existence of the Mechanical Department Association the relations between the defendant and its mechanical department employees were amicable and harmonious.

"5. During the latter part of 1933, at the instance of one or more mechanical department employees of the Railway Company, the Chairman of a system craft organization of the employees of the Chesapeake and Ohio Railway Company affiliated with the American Federation of Labor came among defendant's mechanical de-

partment employees to organize local and system associations which would affiliate with the American Federation of Labor, and to that end called meetings of the employees and enlisted the activities of certain of said employees. During or about the same time other organizers for the American Federation of Labor not employees of the defendant also worked among the Company's employees to persuade them to affiliate with the American Federation of Labor. As a result of these ac-
(386) tivities the plaintiff Federation was organized on April 28, 1934.

"6. During July, 1934, on application of the American Federation of Labor made prior to April 17, 1934, the Board of Mediation checked authorizations held by the Federation to ascertain whether the said organization held the authorizations of a majority of defendant's mechanical department employees to act as their representative for the purposes of the Railway Labor Act, and found that the authorizations so held were from less than a majority of the said employees.

"7. In August, 1934, the National Mediation Board accepted a new request from the American Federation of Labor for an investigation and certification of the representatives of defendant's mechanical department employees under the provisions of the Amended Railway Labor Act, and sent a mediator to the defendant's offices at Norfolk, Virginia, for that purpose. At a conference conducted by the mediator and attended by representatives of the said Federation and of the carrier, an agreement was prepared providing, among other things, for the holding of an election to decide whether the Federation or the Association should be the representative of the mechanical department employees for the purposes aforesaid, and that—

"The vote will be taken and counted separately for each of the six shop craft organizations, and each organization receiving a majority of the total votes shown on the eligible list of voters will be recognized as representatives of the employees in question."

"At this conference, upon the request of the American

Federation of Labor representative, and although the facts were brought to the mediator's attention, the mediator, as directed by the National Mediation Board, designated an active member of the Federation as a member of the election board and as an observer in behalf of the Association.

"8. An election was begun on August 16, 1934, under the arrangement made as aforesaid, but was never concluded. At the conclusion of the balloting at the place at which votes were to be first taken, the member of the election board and observer in behalf of the Federation protested the election to the Mediation Board on the ground that the employees were being influenced by the Company not to vote, and pursuant to such protest the Mediation Board ordered a new election. The evidence does not show that defendant exerted influence on its employees to prevent them from voting in the election begun August 16, 1934, or that said election was unfair.

"9. Prior to the new election, an agreement was entered into between the aforesaid member of the election board and observer acting as the representative of the Federation and the aforesaid member of the election board and observer designated by the mediator to represent the Association containing the following provisions:

'2. Employees eligible to vote shall be those below (387) the rank of Foreman in the Crafts generally known as, Machinists, Boilermakers, Blacksmiths, Sheet Metal Workers, Electrical Workers, and Carmen, their Apprentices and Helpers whose names appear on the Payroll for the first half of April 1934, and those who have been furloughed since April 1, 1934. Leading men whose duties are wholly Supervisory will not be included. Linemen in the Telegraph and Telephone Department will be considered eligible to vote, also Coach Cleaners.

'4. The vote will be taken and counted separately for each of the Six Shop Craft Organizations, and each Organization receiving the majority of the Legal votes cast will be recognized as representative of the Employees in question.'

"Defendant's officer in charge of its mechanical department and of the employees therein refused to sign or approve said agreement, although requested so to do by the Mediator and the representative of the Federation. An election was held pursuant to the agreement, there being 824 employees on the list of eligible voters divided among the crafts as follows: Machinists 267; Blacksmiths 46; Boilermakers 79; Electricians 114; Sheet Metal Workers 52; Car Men 266.

"10. Of the eligible voters, about 340 were employed at defendant's shops at Princeton, W. Va. About 20 certain specified individual employees out of that total performed minor repairs, known as running repairs, required in the ordinary course of operation to maintain rolling stock in proper condition. The approximately 320 remaining employees at Princeton performed no running repairs, but were engaged exclusively in manufacturing parts and supplies, and in what are known as heavy repairs to equipment withdrawn from service. The average time the equipment was out of service was approximately three months.

"11. On September 13, 1934, the National Mediation Board issued the following certificate:

In the matter of	
Representation of Employees	Case No. R-5
of the	Certification
Virginian Railway Company Mechanical Department	September 13, 1934

"On August 10, 1934, the services of the National Mediation Board were invoked by the Railway Employes' Department of the American Federation of Labor in behalf of certain mechanical department employees of the Virginian Railway Company to settle a dispute among the employees as to who may properly represent the various classes of workers employed in the mechanical department, as provided by Section 2, Ninth, of the Railway Labor Act, as amended.

"The Board directed its mediator, R. B. Bronson, to (388) investigate the dispute. During the course of the investigation an agreement was made in writing by the various organizations claiming to represent the employees that they desired to determine the question of representation by a secret ballot, that the vote should be taken and counted separately for each of the shop crafts, and that each organization receiving a majority of the legal votes cast will be recognized as the representative of the employees in question.

"Following is the result of the vote as reported by the mediator and attested to by representatives of the parties who acted as observers:

"Machinists

Number voting for representation by System Federation No. 40, Railway Employes' Dept., A. F. of L.	141
Number voting for representation by Mechanical Dept. Association of the Virginian Railway Co.	41

"Boilermakers

Number voting for representation by System Federation No. 40, Railway Employes' Dept., A. F. of L.	51
Number voting for representation by Mechanical Dept. Association of the Virginian Railway Co.	9

"Blacksmiths

Number voting for representation by System Federation No. 40, Railway Employes' Dept., A. F. of L.	22
Number voting for representation by Mechanical Dept. Association of the Virginian Railway Co.	8

"Sheet Metal Workers

Number voting for representation by System Federation No. 40, Railway Employes' Dept., A. F. of L.	37
Number voting for representation by Mechanical Dept. Association of the Virginian Railway Co.	9

"Carmen and Coach Cleaners

Number voting for representation by System Federation No. 40, Railway Employes' Dept., A. F. of L. 98

Number voting for representation by Mechanical Dept. Association of the Virginian Railway Co. 20

"Electrical Workers

Number voting for representation by System Federation No. 40, Railway Employes' Dept. A. F. of L. 80

Number voting for representation by Mechanical Dept. Association of the Virginian Railway Co. 11

"On the basis of this investigation and report, the (389) National Mediation Board hereby certifies that the System Federation No. 40, Railway Employes' Department, American Federation of Labor, has been duly designated and authorized to represent the mechanical department employees of the Virginian Railway Company.

"By order of the NATIONAL MEDIATION BOARD
"(Signed) GEORGE A. COOK,
(Seal) Secretary.

"12. From the time of the receipt of the aforesaid certificate of the Board, the defendant protested to the Board the irregularities of the election, and the validity of the certificate based thereon, but without avail. On December 1, 1934, an employee of defendant's mechanical department, representing the new Independent Shop Crafts Association, presented to the Board a petition signed by more than five hundred of defendant's mechanical department employees, stating that the signers did not desire to be represented by the Federation and at the same time filed affidavits as to the incapacity of the employee appointed by the Board to represent the Association to act as a representative of the Association in the second election or to sign the contract under which said election was held. The Board took no action on this petition.

"13. On September 21, 1934 representatives of the

Federation wrote to defendant requesting a conference for the purpose of entering into an agreement with the Federation (Plaintiff's Exhibit 3). This was followed by an exchange of letters between the parties relative to a conference and by a visit from the Committee of the Federation on November 14, 1934, to Defendant's President at Norfolk, who at that time was unwilling to confer with said Committee because of questions pending as to the legality of the Certificate of the Board. Thereafter on December 27, 1934 representatives of the Defendant met with representatives of the Federation at Princeton, West Virginia. At this conference the Federation representatives presented a contract to be executed by the Defendant under the terms of which the existing contract with the Association, with certain additions and modifications, was to be transferred to the System Federation No. 40. The defendant after taking time to consider said contract has declined to sign the same.

"14. The evidence does not justify a finding that the defendant, or any of its officers or agents, committed any of the acts alleged in paragraph VIII of the bill to have been committed for the purpose of influencing, interferring with and coercing its mechanical department employees in their choice of a representative for the purposes of the Railway Labor Act, or has threatened or is threatening to commit any of the aforesaid acts or any acts of influence, interference, or coercion in respect of the employees' choice of a representative or unless restrained will commit any of said acts, or any act of influence, interference, or coercion in respect of the employes' choice.

"15. The evidence does not justify a finding that defendant has actually authorized or ratified any threat to commit or the commission of any of the acts alleged in paragraph VIII of the bill to have been committed for the purpose of influencing, interfering with and coercing defendant's mechanical department employees in their (390) choice of a representative for the purposes of the Railway Labor Act, or that defendant has actually authorized or ratified any threat to commit or the commission of any act of influence, interference or coercion in

respect of the employees' choice of a representative, after actual knowledge of any such threat or act.

"16. The defendant issued the circular of July 11, 1934, referred to and quoted in part in paragraph V of the bill for the primary purpose of apprising the members of the Mechanical Department Association of the facts involved in the pending dispute between the Federation and the Association and of the rights of independent local labor organizations and of railway employees under the then recently amended Railway Labor Act.

"17. The evidence does not justify a finding that defendant has threatened or is threatening to issue another circular of the character or purpose of the circular of July 11, 1934, referred to and quoted in part in paragraph V of the bill, or that it will issue any such circular in the future unless restrained.

"18. There is no evidence that defendant is organizing, promoting, fostering, or encouraging any labor organization among its mechanical department employees, or that it is threatening or intending to do so.

"19. There is no evidence that defendant is threatening or intending to enter into any new contract with any association or organization concerning rules, rates of pay, or working conditions of its mechanical department employees."

CONCLUSIONS OF LAW

"1. The certificate of National Mediation Board of September 13, 1934, is void because the Railway Labor Act under which it is issued is void so far as it applies to the facts of this case in that—

"(a) It contravenes the power of Congress under the interstate commerce clause of the Constitution of the United States.

"(b) It contravenes the 5th Amendment of the Constitution.

"2. The certificate of National Mediation Board is void in that—

"(a) The election upon which it is based was conducted and decided under rules contrary to provisions of the Railway Labor Act.

"(b) It does not find or report as a fact that a majority of any craft or class of defendant's employees have chosen the complainant Federation or any other organization as their representative for the purposes of the Act.

"3. It has not been established that the complainant (391) Federation is the duly chosen and designated representative of any craft or class of defendant's employees for the purposes of the Railway Labor Act.

"4. The circular of July 11, 1934, was not interference, influence, or coercion by defendant over the designation of representatives by the employees within the prohibition of the Railway Labor Act, and is not the subject of an injunction order under the provisions of United States Code Title 29, Section 4 (Act March 23, 1932, c. 90; Sec. 4).

"5. Complainants have not established any of their allegations either those specifically required by the injunction act to be alleged, or those to be established by testimony, respecting interference, influence, or coercion by defendant in the matter of the choice by its mechanical department employees of representatives for the purposes of the Railway Labor Act.

"6. This is a case involving or growing out of a labor dispute within the provisions of U. S. Code, Title 29, Sections 101-115, and the court is subject to the restrictions there provided.

"7. Complainants are not entitled to a restraining injunction or a mandatory injunction as prayed.

"8. The bill will be dismissed with costs against the complainants."

WHEREFORE, the defendant prays that said decree of August 23rd, 1935, be reversed and a decree entered herein dismissing the bill of complaint.

W. H. T. LOYALL,
H. T. HALL,
J. C. DONNALLY,
W. C. PLUNKETT,
Counsel for Appellant.

PRAECIPE FOR TRANSCRIPT OF RECORD

(392) Filed Dec. 17, 1935.

(Style of Court and Title omitted.)

TO THE CLERK OF THE ABOVE COURT:

You are hereby requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Fourth Circuit, pursuant to an appeal allowed in the above entitled cause and to include in such transcript of record the papers and exhibits listed in the stipulation and agreement hereto attached as a part hereof.

W. H. T. LOYALL,
Counsel for Appellant.

Service of the foregoing praecipe is hereby acknowledged, and designation of any additional portion of the record is hereby waived, this the 29th day of November, 1935.

S. M. BRANDT,
Counsel for Appellee.

STIPULATION OF COUNSEL AS TO CONTENTS OF RECORD ON APPEAL

(393) Filed Dec. 17, 1935.

(Style of Court and Title omitted.)

It is hereby stipulated and agreed that the following shall constitute the record on appeal in the above entitled cause:

1. Bill of Complaint and exhibits therewith filed.

2. Defendant's Motion to Dismiss.

3. The answer of the Defendant and Exhibit No. 4 thereto attached, but omitting Exhibits No. 1, 2 and 3 filed with the Answer, which, or parts of which, are otherwise included in the record.

4. A statement in narrative form of all of the evidence, with proper index, adduced at the trial in the District Court as provided by Rule 38 of the Circuit Court of Appeals.

5. The following exhibits offered at the trial of the above cause by the Complainant:

Exhibit No. 1. Printed statement of J. W. Sasser, dated July 11th, 1934, omitting title on cover except date.

Exhibit No. 2. Consisting of two paper writings as follows:

(a). A Notice of election to be held under the Railway Labor Act, involving shop craft employes of the Virginian Railway Company.

(b). The second page thereof being a copy of the official ballot posted for use in the election, and also being the documents used by the mediator prior to the taking

of the ballot in Princeton, West Virginia, this election having been stopped.

Exhibit No. 5. A letter dated September 21, 1934, ad-
(394) dressed to C. Bucholtz, President of the Virginian Railway Company by the Executive Board of System Federation No. 40, Railway Employes Department of the American Federation of Labor, its several general chairmen, and W. H. Gorman, representative of the Railway Employes Department of the American Federation of Labor.

Exhibit No. 6. A letter dated at Huntington, West Virginia, October 5, 1934, addressed to C. Bucholtz, President of the Virginian Railway Company, by W. H. Gorman, representative of the Railway Employes Department, American Federation of Labor.

Exhibit No. 7. A letter dated October 12, 1934, addressed to W. H. Gorman by President Bucholtz of the Virginian Railway Company, and attached thereto is a letter dated September 29, 1934, signed by C. Bucholtz addressed to E. R. Belcher.

Exhibit No. 8. A letter dated October 12, 1934, addressed to William M. Leiserson, Chairman of the National Mediation Board, Washington, D. C., and signed by C. Bucholtz, President of Virginian Railway Company.

Exhibit No. 9. A letter dated October 15, 1934, addressed to Mr. C. Bucholtz, President of the Virginian Railway Company, signed by George A. Cook, Secretary, who is Secretary of the National Mediation Board.

Exhibit No. 10. A letter dated October 19, 1934, addressed to Mr. B. M. Jewell, President of the Railway Employes Department, American Federation of Labor, and signed by Mr. C. Bucholtz.

Exhibit No. 11. A letter dated November 5, 1934, addressed to Mr. C. Bucholtz, President, and signed by W. H. Gorman.

Exhibit No. 12. A letter dated November 9, 1934, ad-
(395) dressed to Mr. E. R. Belcher and signed by C. Bucholtz, President.

Exhibit No. 13. A telegram dated at Huntington, West Virginia, November 12, 1934, addressed to C. Bucholtz, President, signed by W. H. Gorman.

Exhibit No. 14. A telegram dated November 13, 1934, addressed to W. H. Gorman and signed by W. D. Baker, Assistant to the President of Virginian Railway Company.

Exhibit No. 16. A letter dated November 19, 1934, addressed to Mr. C. Bucholtz, President, and signed by W. H. Gorman, representing the Railway Employes Department of the American Federation of Labor.

Exhibit No. 17. Letter dated December 17, 1934, from C. Bucholtz to E. R. Belcher.

Exhibit No. 18. Form of Affidavit circulated at Victoria.

Exhibit No. 19. Authorization to Munsey to represent the Association in the election, given by Carmen of Roanoke, August 17th, 1934.

Exhibit No. 20. Authorization given Munsey by Boilermakers.

Exhibit No. 21. Authorization given Munsey by Electrical Workers.

Exhibit No. 22. Authorization given Munsey by his own craft, signed by him.

Exhibit No. 23. Form of Application for membership in Independent Shop Crafts Association.

Exhibit No. 24. Constitution of Mechanical Department Association.

(396) DEFENDANT'S EXHIBITS AS FOLLOWS:

Exhibit A. Expense account of Munsey covering expenses while acting as observer during election.

Exhibit B. Letter from J. W. Sasser to Munsey dated September 12, 1934, concerning payment of expenses set out in Exhibit 1.

Exhibit D. Letter dated October 30, 1922, from F. M. Billmeyer to G. H. Hix.

Exhibit E. Letter dated November 2, 1922, from C. H. Hix to F. M. Billmeyer.

Exhibit F. Letter dated March 7, 1934, from B. M. Jewell to C. Bucholtz.

Exhibit G. Letter dated April 17, 1934, from George A. Cook to Carl Bucholtz.

Exhibit K. Memorandum July 16th, 1934, Harrison H. Reed, Mediator.

Exhibit L. Telegram dated August 10, 1934, from Wm. M. Leiserson to C. Bucholtz.

Exhibit M. Letter dated August 10, 1934, from C. Bucholtz to Wm. M. Leiserson.

Exhibit N. Bulletin dated August 16, 1934, R. B. Bronson, Mediator.

Exhibit O. Letter dated November 19, 1934, from C. Bucholtz to National Mediation Board.

Exhibit P. Letter dated December 20th, 1934, from Walter G. Burton to C. Bucholtz.

Exhibit Q. Letter dated December 23, 1934, from C. Bucholtz to Walter G. Burton.

Exhibit R. Those portions of this exhibit (the agree-

ment between the defendant and the Mechanical Department Association of November 15, 1922) as follows:

"The title of the Agreement set out on page 3 begin-
(397) ning with "Agreement" and ending with "Helpers."

Rule 24 and title (pp. 16 & 17).
Rules 33, 34 and 35 (pp. 22 and 23) and titles.
Rule 41 and title (p. 28).
Rules 111, 112, and 113, and title and signatures to agreement.

Exhibit T. Mimeograph Notice to employes in accordance with Railway Labor Act approved June 21, 1934, said notice being dated August 14, 1934. **Exhibit U.** is identical with Exhibit T. except for signature.

Exhibit V. Bulletin, J. W. Sasser to Tinder and Halstead, dated August 16, 1934.

Exhibit W. Bulletin dated August 18, 1934, by J. W. Sasser.

Exhibit X. Form of application in use at the time Munsey applied for a job.

6. The Opinion of the Court filed July 24, 1935.

7. The Decree of the Court entered August 23, 1935.

8. Assignments of Error filed October 9, 1935.

9. Praecipe.

10. Stipulation for Clerk to print the Record under Rule 23.

FRANK L. MULHOLLAND
and
S. M. BRANDT,
Attorneys for Appellee.

W. H. T. LOYALL,
Attorney for Appellant.

STIPULATION AS TO PRINTING RECORD UNDER RULE 23.

(398)

Filed Dec. 17, 1935.

(Style of Court and Title omitted.)

It is hereby stipulated and agreed that the Clerk of this Court shall make up a transcript of the record in the above styled cause and transmit the same to the Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Virginia, and that it be printed under the supervision of the Clerk of that Court in accordance with Rule 23.

S. M. BRANDT,
Attorney for Appellee.

W. H. T. LOYALL,
Attorney for Appellant.

MEMORANDUM OF ORIGINAL PAPERS ACCOMPANYING TRANSCRIPT OF RECORD

(399)

1. Petition for appeal, filed October 9, 1935.

2. Order allowing appeal, entered and filed October 9, 1935.

3. Citation on appeal. Legal service accepted.

4. Appeal bond in the penal sum of $5,000.00 with The Virginian Railway Company, as principal, and United States Guarantee Company, as surety, conditioned for costs and damages.

5. Order extending the time to Dec. 14, 1935, within which to file transcript of record on appeal with the Clerk of the U. S. Circuit Court of Appeals, entered and filed Nov. 2, 1935.

6. Order extending the time to January 5, 1936, within which to file transcript of record on appeal with the Clerk of the U. S. Circuit Court of Appeals, entered and filed Dec. 6, 1935.

7. Order extending the time to January 18, 1936, within which to file transcript of record on appeal with the Clerk of the U. S. Circuit Court of Appeals, entered and filed January [illegible], 1936.

(400) **CERTIFICATE OF THE CLERK**

UNITED STATES OF AMERICA,
Eastern District of Virginia, ss.:

I, C. L. WRIGHT, Clerk of the District Court of the United States for the Eastern District of Virginia, do hereby certify that the foregoing is a full and true transcript of the record of proceedings and judgment of said Court, as stipulated by counsel, in the therein entitled cause.

In testimony whereof, I hereunto set my hand and affix the seal of said Court, at Norfolk, in said District, this 11th day of January, 1936.

C. L. WRIGHT,
Clerk, U. S. District Court.
By C. P. BREESE, JR.,
Deputy Clerk.

(Seal)

PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

(307) No. 4005.

The Virginian Railway Company, Appellant,

versus

System Federation No. 40, Railway Employes Department of the American Federation of Labor, in its own right and as the actual and legally designated representative of all Machinists, Boilermakers, Blacksmiths, Sheet Metal Workers, Carmen, Coach Cleaners, and their respective specialists, apprentices, and helpers in the employ of The Virginian Railway Company in the States of Virginia and West Virginia, E. J. Preston, individually, as System General Chairman and as General Chairman for the Machinists, Andy Duncan, individually and as General Chairman for the Boilermakers, W. S. Penturff, individually and as General Chairman for the Blacksmiths, W. M. Sarver, individually and as General Chairman for the Sheet Metal Workers, A. P. Wyatt, individually and as General Chairman for the Electricians, and P. L. Allen, individually and as General Chairman for the Carmen and Coach Cleaners, Appellees.

APPEAL from the District Court of the United States for the Eastern District of Virginia, at Norfolk.

January 13, 1936, the transcript of record is filed and the cause docketed.

Same day, the original petition for appeal, order allowing appeal, bond, and citation are certified up under section 7 of Rule 14.

Same day, three orders extending the time to and including the 18th day of January, 1936, within which to file the transcript of record are filed.

Same day, the appearance of W. H. T. Loyall, W. C. Plunkett, H. T. Hall, J. C. Donnally and James Piper is entered for the appellant.

January 16, 1936, the appearance of S. M. Brandt is entered for the appellees.

January 22, 1936, the appearance of Frank L. Mulholland and Clarence M. Mulholland is entered for the appellees.

February 1, 1936, twenty-five copies of the printed (308) record are filed.

March 25, 1936, stipulation as to the time for the filing of the appellees' brief and the appellant's reply brief is filed.

APPLICATION BY THE UNITED STATES FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE CONSTITUTIONALITY OF THE RAILWAY LABOR ACT AS APPLIED IN THIS CASE.

Filed April 16, 1936.

(Style of Court and Title Omitted.)

The United States herewith applies for leave to file a brief as *amicus curiae* in support of the constitu-

tionality of the Railway Labor Act. The constitutionality of the Act is challenged in two aspects. The present case is the first in which these constitutional issues have been presented to any appellate tribunal. Although the Government is not a party to this action, which is brought by a labor organization against the appellant railroad, the Government is a party in several other cases now pending in the district courts in which the same constitutional issues are presented.

Counsel for both parties in the instant case have consented to the filing of a brief by the Government as *amicus curiae,* and copies of the proposed brief have been sent to them.

This case involves the application of the Railway Labor Act to back-shop railway employees. Appellant contends that the Act is unconstitutional both as applied to these employees and in its entirety. The case thus presents a fundamental question as to the scope of the federal power under the commerce clause over the relationship between the interstate railroads and their employees.

The Government desires to limit its brief as *amicus curiae* to the constitutional questions. Although the other questions in the case are important it is felt that their consideration may properly be left to counsel for (309) the respective parties.

Respectfully submitted,

JOHN DICKINSON,
JOHN DICKINSON,
Assistant Attorney General.

ORDER GRANTING LEAVE TO UNITED STATES TO FILE BRIEF AND MAKE ORAL ARGUMENT AS AMICUS CURIAE.

Filed and Entered April 16, 1936.

UNITED STATES CIRCUIT COURT OF APPEALS

FOURTH CIRCUIT

No. 4005.

The Virginian Railway Company,
Appellant,

vs.

System Federation No. 40, Railway Employes Department of the American Federation of Labor, et al., Appellees.

APPEAL from the District Court of the United States for the Eastern District of Virginia, at Norfolk.

UPON THE MOTION of the United States for leave to file a brief as amicus curiae in support of the constitutionality of the Railway Labor Act in the above entitled case, and it appearing that counsel for the respective parties have consented thereto,

LEAVE is hereby granted the United States to file a brief and to make oral argument as amicus curiae in the above entitled case.

April 16th, 1936.

JOHN J. PARKER,
Senior Circuit Judge.

ARGUMENT OF CAUSE

April 20, 1936, (April term, 1936) cause came on to be heard before Parker, Northcott and Soper, Circuit Judges, and is argued by counsel and submitted.

OPINION

Filed June 18, 1936.

UNITED STATES CIRCUIT COURT OF APPEALS

(310) FOURTH CIRCUIT

No. 4005.

THE VIRGINIAN RAILWAY COMPANY,
Appellant,

versus

SYSTEM FEDERATION NO. 40, RAILWAY EMPLOYES DEPARTMENT OF THE AMERICAN FEDERATION OF LABOR, in its own right and as the actual and legally designated representative of all Machinists, Boilermakers, Blacksmiths, Sheet Metal Workers, Carmen, Coach Cleaners, and their respective specialists, apprentices, and helpers in the employ of THE VIRGINIAN RAILWAY COMPANY in the States of Virginia and West Virginia, E. J. PRESTON, individually, as System General Chairman and as General Chairman for the Machinists, ANDY DUNCAN, individually and as General Chairman for the Boilermakers, W. S. PENTURFF, individually and as General Chairman for the Blacksmiths, W. M. SARVER, individually and as General Chairman for the Sheet Metal Workers, A. P. WYATT, individually and as General Chairman for the Electricians, and P. L.

ALLEN, individually and as General Chairman for the Carmen and Coach Cleaners,
Appellees.

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk.

(Argued April 20, 1936. Decided June 18, 1936.)

Before PARKER, NORTHCOTT and SOPER, Circuit Judges.

(311)

JAMES PIPER and H. T. HALL (W. H. T. LOYALL and JOHN C. DONNALLY on brief) for Appellant, and CLARENCE M. MULHOLLAND and S. M. BRANDT (FRANK L. MULHOLLAND on brief) for Appellees, and LEO F. TIERNEY, Special Assistant to the Attorney General (JOHN DICKINSON, Assistant Attorney General, WENDELL BERGE, Special Assistant to the Attorney General, and ROBERT L. STERN, Special Attorney, on brief) for the United States, as *amicus curiae*.

PARKER, Circuit Judge:

On August 20, 1934, an election was conducted by the National Mediation Board among the employees of the mechanical department of the Virginian Railway to select a representative of these employees to act for them under the Railway Labor Act as amended by the Act of June 21, 1934, 48 Stat. 1185, 45 USCA 151 et seq. At this election, System Federation No. 40 of the American Federation of Labor was the choice of the majority of those eligible to vote in four crafts, viz. the Sheet Metal Workers, the Machinists, the Electrical Workers and the Boilermakers. It received a majority of the votes cast by the Blacksmiths and the Carmen and Coach

Cleaners, but not a majority of the eligible votes of those crafts. In the case of the Blacksmiths a majority of those eligible to vote participated in the election, but in the case of the Carmen and Coach Cleaners this was not true. The Mediation Board, on September 13, 1934, certified under the statute that System Federation No. 40 had been chosen by all six of the crafts named to represent them for the purposes of collective bargaining; and upon the refusal of the railway company to treat with or recognize the Federation as the representative of the (312) employees in question, this suit was instituted, asking that the railway be required to treat with it as the representative of the employees and be enjoined from attempting to influence or interfere with the employees thereafter in their choice of representatives for the purpose of collective bargaining.

The judge below heard the case fully and carefully and correctly analyzed the evidence in his opinion reported in 11 Fed. Supp. 621, to which we refer as a sufficient statement of the facts. In holding the Federation entitled to the relief prayed, except as to the right to represent the Carmen and Coach Cleaners, he made the following findings as to the determinative facts, viz.: (1) that the defendant is a common carrier by railroad engaged in interstate commerce; (2) that System Federation No. 40 is the duly authorized representative of the Mechanical Department Employees of the defendant, except the Carmen and Coach Cleaners, having been designated as such by the National Mediation Board, on September 13, 1934, in accordance with the provisions of the Railway Labor Act; (3) that the defendant, in violation of the provisions of that act, has failed to treat with System 40 as representative of employees who have chosen it as their representative; and (4) that, by means of personal interviews, posted bulletins and the circulation of a pamphlet calling attention to the disadvantages of membership in a standard labor organization and the advantages of a company union, the defendant has sought

to influence the employees of its mechanical department "against any participation in or association with a standard labor organization and thereby to maintain a mere nominal association or union supported wholly by the defendant", and that the defendant since the certification by the Mediation Board has "continued and doth now continue * * * to endeavor to deprive its mechanical department employees of any and all right to independent representation for the purpose of collective bar-
(313) gaining."

A careful study of the evidence convinces us that these findings are amply supported. It has been argued with much earnestness that the influence forbidden by the act is something in the nature of undue influence, reliance being placed upon expressions contained in the opinion in *Texas & N. O. R. Co.* v. *Railway Clerks* 281 U. S. 548, at p. 568, and that the circulation of the pamphlet, referred to as the Sasser statement, should not be condemned as constituting the exercise of such undue influence. It must be remembered in this connection, however, that any sort of influence exerted by an employer upon an employee, dependent upon his employment for means of livelihood, may very easily become undue, in that it will coerce the employee's will in favor of what the employer desires against his better judgment as to what is really in the best interest of himself and his fellow employees. One purpose of the Railway Labor Act as amended was to insure free and untrammeled action on the part of the employees in the choice of their representatives for the purpose of collective bargaining; and it is a violation of the terms, as well as of the spirit of the Act, for the employer to address arguments to the employee couched in such terms, or presented in such manner, as to lead the employee to fear that he may suffer from the action of the employer if he does not follow the wishes of the latter in making his choice of representatives. Collective bargaining would be a delusion and a snare if the employer were permitted to

exert pressure of any sort upon the employee with respect to a matter of this kind.

It is not necessary to decide here whether the Sasser statement, standing alone, would be sufficient to convict the railway of attempting to interfere with and unduly influence its employees in their choice of representatives, as we think that the other evidence, when considered in connection with that statement, is sufficient to support the finding of the trial judge in that regard. There can be no question, therefore, but that, granting the constitu-
(314) tionality of the Railway Labor Act, the portion of the decree enjoining the railway from interfering with the employees in the choice of representatives should be affirmed, unless there is something in the Norris-La-Guardia Act of March 23, 1932, 47 Stat. 70, 29 USCA 101 et seq., which forbids the granting of such an injunction. *Texas & N. O. R. Co.* v. *Railway Clerks, supra.* We agree with the trial judge that that act does not forbid the granting of an injunction under the circumstances here appearing. As was well said by him:

"Does the evidence present a case which meets the requirements of that Act? It seems to me that this question must be answered in the affirmative. The railway acting through its officers and agents, has persistently interfered with the shop craft employees in their efforts to organize for the purpose of collective bargaining, one of the principal objects if not the dominant object of the Railway Labor Act. This unlawful interference and purpose to influence its employees has been evidenced chiefly through activities of the railway in creating and promoting so called independent organizations, both before and since the election and by its fixed determination not to recognize or treat with the chosen representatives of the crafts unless they come from an organization under its control. In addition, I hardly think that any one can read with an open mind the Sasser statement referred to and quoted at length above without fairly concluding that it was printed and circulated to 'use the authority and power' of the railway 'to induce action' by the members of the craft 'in

derogation of what the statute calls 'self organization' ". That it probably and naturally had the intended effect on many of those to whom it was delivered is no more than a reasonable inference to be drawn from the situation and power of the author over those to whom it was addressed. It is likewise clear that similar acts will be continued in the future to defeat or seriously interfere with self organization and representation unless prohibited. The right of self organization and representation in the matter of rates of pay, hours of labor, and working conditions is a property right, the loss of which would result in irreparable damage to complainants. (315) *Texas N. O. R. Co.* v. *Ry. Clerks, supra.* Complainants have no adequate remedy at law to enforce that right, greater injury will undoubtedly be inflicted upon them by denial than upon defendant by the granting of relief, and the controversy is not a matter with which local public officials can deal. It involves rights granted by an Act of Congress and local public officials are without authority or power to protect or enforce such rights. *Myers* v. *La. & A. Ry.*, 7 Fed. Supp. 92, 97."

This leaves four questions for our consideration: (1) whether the mandatory feature of the decree is warranted by the statute and not forbidden by the Norris-LaGuardia Act; (2) whether the statute is a valid exercise of the power of Congress to regulate interstate commerce; (3) whether the statute is constitutional when tested by the due process clause of the 5th Amendment; and (4) whether a majority of the votes cast in a craft election is sufficient for the choice of a representative for collective bargaining, or whether a majority of those eligible to vote is required. We shall consider these in the order named.

1. THE QUESTION AS TO THE MANDATORY INJUNCTION.

It is argued that the Railway Labor Act does not require agreement upon the terms of any contract and that in providing merely that the carrier shall treat with the representatives it does not prescribe any duty enforce-

able in the courts. It is true that the Act does not require agreement between the carrier and the representative of its employees; but the whole purpose of the Act is to set up machinery for the settlement of disputes by which disagreements resulting in strikes may be avoided, and it is essential to the working of this machinery that the carrier treat with the representative of the employees as contemplated by the Act. Thus, it is provided by Section 2 (second) thereof (48 Stat. 1187, 45 USCA 152 (second) that all disputes between a carrier and its (316) employees shall be considered, and, if possible, decided in conference between representatives designated and authorized to confer. It is provided by Section 2 (sixth) (48 Stat. 1188, 45 USCA 152 (sixth) that, in case of a dispute arising out of grievances or the interpretation or application of agreements, it shall be the duty of the representatives of the carrier and of the employees, within ten days after the receipt of notice of a desire on the part of either party to confer with respect to such dispute, to fix a time and place for a conference. Section 6 (48 Stat. 1197, 45 USCA 156) provides that carriers and representatives of employees shall give at least thirty days written notice of an intended change in agreements affecting rates of pay, rules or working conditions, and shall agree upon the time and place for the beginning of conference between representatives of the parties interested in such intended changes within ten days after the receipt of the notice. Carriers are forbidden to change the rates of pay, rules or working conditions as embodied in agreements without giving the 30 day notice just referred to, except in cases where the agreements themselves provide for the change. 48 Stat. 1188, 45 USCA 152 (seventh).

If the conferences thus provided for do not result in the settlement of disputes, the Act has other provisions for their settlement which require action on the part of the representatives of the parties. Thus, either of the parties, which in the case of the employees means

their representatives, may invoke the services of the Mediation Board if a dispute is not adjusted in conference, and there is provision for the preservation of the status quo for a thirty day period in case the Mediation Board shall fail in bringing the parties to agreement or in securing an arbitration of grievances. 48 Stat. 1195, 45 USCA 155. In case of agreement to arbitrate, the representative of the employees is to select one of the arbitrators if of a board of three, or two if of a board of six; and such representative is to sign the (317) agreement to arbitrate in behalf of the employees. 44 Stat. 582 and 584, 48 Stat. 1197, 45 USCA 157 and 158. Questions submitted to arbitration are to be withdrawn upon notice in writing signed by the representatives of the parties. 44 Stat. 584, 45 USCA 158(f). And the entire submission to arbitration may be revoked by agreement signed by their representatives. 44 Stat. 585, 45 USCA 158. An award of a board of arbitration constituted under the act is to be filed in the office of the clerk of the Federal District Court; and, unless the award is impeached as provided in the act, the court is required to enter judgment thereon which shall be final and binding on the parties. 44 Stat. 585, 45 USCA 159.

It is clear that all of these provisions, so carefully made for the settlement of disputes which might lead to strikes and industrial warfare, would amount to nothing if the carrier should refuse to recognize or treat with the representatives of its employees; and it was to guard against just this contingency, that it was provided by the first and second sentences of Section 2 (ninth) of the Act of June 21, 1934 (48 Stat. 1188, 45 USCA 152 (ninth):

"If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to

both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier *shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act.*" (Italics ours.)

The history of the Railway Labor Act shows that it (318) was the purpose of Congress by the use of this language to impose a binding duty upon the carrier to recognize and treat with the representatives of the employees as certified by the Mediation Board. The Transportation Act of 1920 provided merely that the carriers and their employees should exert every reasonable effort to avoid interruption to the business of the carriers growing out of disputes with their employees, with provision that the parties should endeavor to settle such disputes and, if unable to do so, should refer them for arbitration to the appropriate board set up under the Act. 41 Stat. 469, 45 USCA 132. And the Supreme Court decided that the courts were without power to enforce this provision of the Act, which depended for its force upon the moral sanction of public opinion, saying: "The statute does not require the railway company to recognize or to deal with, or confer with labor unions. It does not require employees to deal with their employers through their fellow employees. But we think it does vest the labor Board with power to decide how such representatives ought to be chosen with a view to securing a satisfactory cooperation and leaves it to the two sides to accept or reject the decision." *Penna. R. Co.* v. *U. S. Railroad Labor Board* 261 U. S. 72, 84, 85; *Penna. etc. Federation* v. *Penna. R. Co.* 267 U. S. 203; *Malone* v. *Gardner* (C. C. A. 4th) 62 Fed. (2d) 15.

The Railway Labor Act of 1926, 44 Stat. 577, created certain definite legal obligations enforceable by judicial

proceedings for the purpose, among other things, of safeguarding the rights of the employees to bargain collectively through representatives of their own choosing without interference on the part of the carrier. *Texas & N. O. R. Co.* v. *Railway Clerks* 281 U. S. 548, 569. It did not, however, provide the machinery necessary for determining the representatives of the employees or for requiring the carriers to recognize and deal with such representatives; and the Act of June 21, 1934, 48 Stat. 1185, amending the Railway Labor Act, was passed for the purpose of remedying this defect. As said in the (319) report of the House Committee:

"The bill does not introduce any new principles into the existing Railway Labor Act, but it is designed to amend that act in order to correct the defects which have become evident as a result of 8 years experience.

* * *

"The Railway Labor Act of 1926, now in effect, provides that representatives of the employees, for the purpose of collective bargaining, shall be selected without interference, influence, or coercion by railway management, but it does not provide the machinery necessary to determine who are to be such representatives. These rights of the employees under the present act are denied by railway managements by their disputing the authority of the freely chosen representatives of the employees to represent them. A considerable number of railway managements maintain company unions, under the control of the officers of the carriers, and pay the salary of the employees' representatives, a practice that is contrary to the purpose of the present Railway Labor Act, but it is difficult to prevent it because the act does not carry specific language in respect to that matter. This bill is designed to correct that defect."

We think it clear that the Act of 1934 did more than express a pious hope on the part of Congress that the carriers would deal with the representatives which their employees might choose. In providing that "the carrier shall treat with the representative so certified (by the

Mediation Board) as the representative of the craft or class for the purposes of this Act", it created a legal right on the part of the employees to have the carrier recognize and treat with their chosen representatives for the purposes of collective bargaining and a corresponding duty on the part of the carrier to recognize and treat with such representatives, so that the purposes of the act might not be nullified by the carrier's refusing to recognize a representative selected by its employees and certified as such by the Mediation Board. And it is no (320) objection to this view that the parties are not bound to agree even though they may treat. The representatives of the employees, as above pointed out, have important functions to perform under the act, which they can perform only if the railroad recognizes and treats with them as representing the employees; and while negotiation may not result in agreement, this is no reason why the carrier should arbitrarily refuse to negotiate with those whom its employees have chosen to represent them in negotiations. In collective bargaining, it may be that negotiations will not result in agreement, but it is certain that there will be no agreement without negotiation.

It requires no argument to demonstrate that an ignoring by the carrier of the representatives chosen by the employees and a refusal to treat with them would result in irreparable injury to the employees in defeating their right to collective bargaining through representatives of their own choosing as contemplated by the act (see 281 U. S. at 571); and the case is peculiarly one calling for the exercise of the power of the court to protect the rights of the employees and enforce the duty of the carrier by mandatory injunction, which is properly granted in the sound discretion of a court of equity to enforce a right for which no other remedy is available. *Moor* v. *Texas & N. O. R. Co.* 297 U. S. 101, 56 S. Ct. 372; *Miguel* v. *McCarl* 291 U. S. 442; *In re Lennon* 166 U. S. 548; *Simon* v. *Frankfort Distillery, Inc.* (C. C. A. 6th) 2 Fed. (2d) 949; *Loisel* v. *Mortimer* (C. C. A.

5th) 277 Fed. 882, 886; *Western Union Tel. Co.* v. *Postal Telegraph Co.* (C. C. A. 9th) 217 Fed. 533, 539; *Southern California Ry. Co.* v. *Rutherford* 62 Fed. 796, 797; *Parsons* v. *Marye* 23 Fed. 113, 121; *Wells, Fargo & Co.* v. *Northern Pac. Ry.* 23 Fed. 469, 480, 481; *Myers* v. *Louisiana & A. Ry. Co.* 7 Fed. Supp. 92 and 97.

In the case of *In re Lennon, supra,* an injunction was issued the effect of which was to require one railroad to receive freight cars from another without discrimination. The Supreme Court, in approving the injunction, (321) said:

"Perhaps, to a certain extent, the injunction may be termed mandatory, although its object was to continue the existing state of things, and to prevent an arbitrary breaking off of the current business connections between the roads. But it was clearly not beyond the power of a court of equity, which is not always limited to the restraint of a contemplated or threatened action, but may even require affirmative action, where the circumstances of the case demand it. *Robinson* v. *Lord Byron,* 1 Bro. C. C. 588; *Hervey* v. *Smith,* 1 Key & Johns. 389; *Beadel* v. *Perry,* L. R. 3 Eq. 465; *Whitecar* v. *Michenor,* 37 N. J. Eq., 6; *Broome* v. *New York & New Jersey Telephone Co.* 42 N. J. Eq. 141."

It is argued that the power to grant a mandatory injunction in a labor dispute is denied to the court by Section 9 of the Norris-LaGuardia Act, 47 Stat. 70, 72, 29 USCA 109, which provides: "* * * and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided herein". We think it clear, however, that the purpose of this provision was not to forbid the granting of mandatory injunctions in the rare cases in which they are proper, but to limit the scope of all injunctions

in labor cases to matters specifically alleged in the bill and supported in the findings of fact of the court. Statutes in derogation of the ordinary equity powers of the court should be strictly construed; and a provision manifestly intended to provide against blanket injunctions, of which complaint had been frequently made prior to the passage of the statute, should not be construed to deprive the court of the power to enforce by mandatory decree a right created by act of Congress.

2. IS THE STATUTE A VALID REGULATION (322) OF INTERSTATE COMMERCE?

It is conceded that 97% of the business done by the defendant railway company is interstate in character; but 321 of the 824 mechanical department, or shop craft, employees are employed in the Princeton Shops of the defendant in what is known as "back shop" work, i. e. in the repair of locomotives and cars which are temporarily withdrawn from service for that purpose. It is the contention of the railway that these employees are not engaged in interstate commerce; and that, as the statute is expressly made applicable to them and to other employees defined as such in the orders of the Interstate Commerce Commission, it is invalid as an attempt by Congress to regulate matters affecting intrastate as distinguished from interstate commerce and consequently beyond the scope of its powers. The railway relies for this position particularly upon the first *Employers' Liability Cases* 207 U. S. 463; *Shanks* v. *Delaware L. & N. R. Co.* 239 U. S. 556; and *New York, New Haven and Hartford R. Co.* v. *Bogue* 284 U. S. 415.

There is a difference, however, between what Congress may do to prescribe the measure of liability for injuries occurring in interstate commerce and what it may do to prevent the interruption of that commerce. The mining of coal, for example, is not interstate commerce even though the coal when mined is to be trans-

ported in or used in carrying on interstate commerce (*Carter* v. *Carter Coal Co. et al.* ..... U. S. .....); and one injured in such mining may not be protected by the employers' liability act. *Delaware L. & N. R. C.* v. *Yurkonis* 238 U. S. 439; *Spry* v. *N. & W. R. Co.* (C. C. A. 4th) 50 Fed. (2d) 598. But a conspiracy to interfere with its movement in interstate commerce, is a proper subject of Congressional regulation. *Coronado Coal Co. et al.* v. *United Mine Workers* 268 U. S. 295. In the one case, the power of Congress is measured by (323) what is necessary or proper for the regulation of the liability of the carrier to the employee in the carrying on of interstate commerce, in the other by what is necessary or proper to prevent interference with that commerce.

The purpose of the Railway Labor Act is to prevent the interruption of the business of an interstate carrier resulting from strikes and other industrial disturbances by providing for collective bargaining between such carrier and its employees and the settlement of labor disputes by agreement and arbitration. (47 Stat. 70, 29 USCA 102). For the machinery thus provided to be effective, it must apply to all of the employees of an interstate carrier; for not only would it not be practicable to establish separate organizations for bargaining among the employees engaged in interstate commerce as distinguished from those who are not, but disturbances among the latter would inevitably disturb the interstate business of the carrier and would almost necessarily be communicated to the employees engaged in interstate transportation. The defendant, for example, employs machinists engaged strictly in interstate commerce as well as those who are employed in "back shop" work. It would be out of the question for it to bargain with the former and not with the latter; and, even if this were possible, a labor controversy with those involved in "back shop" work would be communicated to the others and a strike of the "back shop" workmen, if confined to

them, would necessarily interfere with the carrying on of the interstate commerce in which the road is engaged. A typical case is presented, therefore, where Congress must regulate the relationship between the carrier and its employees not engaged directly in interstate transportation, as well as those who are so engaged, to regulate effectively the flow of interstate commerce over which it has plenary power and to prevent interference therewith. The rule applicable in such case was thus stated by the Chief Justice in the recent case of *A. L. A. Schechter Corp.* v. *United States* 295 U. S. 495, 544:

"The power of Congress extends not only to the (324) regulation of transactions which are part of interstate commerce, but to the protection of that commerce from injury. It matters not that the injury may be due to the conduct of those engaged in intrastate operations. Thus, Congress may protect the safety of those employed in interstate transportation 'no matter what may be the source of the dangers which threaten it.' *Southern Ry Co.* v. *United States*, 222 U. S. 20, 27. We said in Second Employers' Liability Cases, 223 U. S. 1, 51, that it is the 'effect upon interstate commerce,' not 'the source of the injury,' which is 'the criterion of congressional power.' We have held that, in dealing with common carriers engaged in both interstate and intrastate commerce, the dominant authority of Congress necessarily embraces the right to control their intrastate operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to secure the freedom of that traffic from interference or unjust discrimination and to promote the efficiency of the interstate service. The *Shreveport Case*, 234 U. S. 342, 351, 352; *Wisconsin Railroad Comm'n* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563, 588. And combinations and conspiracies to restrain interstate commerce, or to monopolize any part of it, are none the less within the reach of the Anti-Trust Act because the conspirators seek to attain their end by means of intrastate activities. *Coronado Coal Co.* v. *United Mine Workers*, 268 U. S. 295, 310; *Bedford Cut Stone Co.* v. *Stone Cutters Assn.*, 274 U. S. 37, 46."

The policy of regulating the relationship between interstate carriers and their employees, for the purpose of eliminating strikes and labor disturbances through collective bargaining, is in line with the policy of the government, developed as a matter of necessity, of dealing with such carriers, not by way of piecemeal restriction, but by way of regulation of the industry as a whole to the end that the country may be furnished an adequate transportation system. As said in the *New England Divisions Case* 261 U. S. 184, 189, 190, with respect to the Transportation Act of 1920, which contained the (325) beginnings of the Railway Labor Act:

"Transportation Act, 1920, introduced into the federal legislation a new railroad policy. *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, 585. Theretofore, the effort of Congress had been directed mainly to the prevention of abuses; particularly, those arising from excessive or discriminatory rates. The 1920 Act sought to insure, also, adequate transportation service. That such was its purpose, Congress did not leave to inference. The new purpose was expressed in unequivocal language. And to attain it, new rights, new obligations, new machinery, were created. The new provisions took a wide range."

And in *Dayton-Goose Creek Ry. Co.* v. *United States* 263 U. S. 456, 478, the Supreme Court said, in sustaining the "recapture" provisions of the Transportation Act of 1920:

"In both cases (*C. B. & Q. R. R.* v. *United States* 257 U. S. 563; *New England Divisions Case* 261 U. S. 184) it was pointed out that the Transportation Act adds a new and important object to previous interstate commerce legislation, which was designed primarily to prevent unreasonable or discriminatory rates against persons and localities. The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well

this burden. To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission, which is to supervise their issue of securities, their car supply and distribution, their joint use of terminals, their construction of new lines, their abandonment of old lines, and by a proper division of joint rates, and by fixing adequate rates for interstate commerce, and in case of discrimination, for intrastate commerce, to secure a fair return upon the properties of the carriers engaged.

"It was insisted in the two cases referred to, and it is insisted here, that the power to regulate interstate (326) commerce is limited to the fixing of reasonable rates and the prevention of those which are discriminatory, and that when these objects are attained, the power of regulation is exhausted. This is too narrow a view of the commerce clause. To regulate in the sense intended is to foster, protect and control the commerce with appropriate regard to the welfare of those who are immediately concerned, as well as the public at large, and to promote its growth and insure its safety."

This broad view of the power of Congress over interstate carriers was but the carrying forward of doctrines laid down in earlier decisions. Thus in *B. & O. R. Co.* v. *I. C. C.* 221 U. S. 612, which dealt with the Hours of Service Act, the court upheld an act of Congress limiting the hours of labor of certain classes of employees of interstate carriers, even though it appeared that it was "utterly impracticable" for the carriers "to divide their employees in such manner that the duties of those who are engaged in interstate commerce shall be confined to that commerce exclusively". In *Southern Ry. Co.* v. *United States* 222 U. S. 20, in upholding the Safety Appliance Act as applied to all cars used on an interstate railroad, the Supreme Court laid down a principle which clearly supports the exercise of power here involved. The court said:

"We come then to the question whether these acts

are within the power of Congress under the commerce clause of the Constitution, considering that they are not confined to vehicles used in moving interstate traffic, but embrace vehicles used in moving intrastate traffic. The answer to this question depends upon another, which is, *Is there a real or substantial relation or connection between what is required by these acts in respect of vehicles used in moving intrastate traffic and the object which the acts obviously are designed to attain, namely, the safety of interstate commerce and of those who are employed in its movement?* Or, stating it in another way, Is there such a close or direct relation or connection between the two classes of traffic, when moving over the same railroad, as to make it certain that the safety of the inter- (327) state traffic and of those who are employed in its movement will be promoted in a real or substantial sense by applying the requirements of these acts to vehicles used in moving the traffic which is intrastate as well as to those used in moving that which is interstate? If the answer to this question, as doubly stated, be in the affirmative, then the principal question must be answered in the same way. And this is so, not because Congress possesses any power to regulate intrastate commerce as such, *but because its power to regulate interstate commerce is plenary and completely may be exerted to secure the safety of the persons and property transported therein and of those who are employed in such transportation, no matter what may be the source of the dangers which threaten it. That is to say, it is no objection to such an exertion of this power that the dangers intended to be avoided arise, in whole or in part, out of matters connected with intrastate commerce.*" (Italics ours).

In the *Minnesota Rate Cases* 230 U. S. 352, 399, the Court further emphasized the power of Congress to regulate the affairs of interstate carriers with respect to matters affecting interstate commerce, notwithstanding the commingling of interstate and intrastate operations, saying:

"The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation

is not to be denied or thwarted by the commingling of interstate and intrastate operations. This is not to say that the Nation may deal with the internal concerns of the State, as such but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere."

And in the *Shreveport Case, Houston & Texas Ry.* v. *United States* 234 U. S. 342, the Supreme Court upheld an order of the Interstate Commerce Commission (328) affecting intrastate rates, holding that Congress had power to regulate even the intrastate charges of a carrier when necessary to prevent interference with interstate commerce. The court said:

"The fact that carriers are instruments of intrastate commerce, as well as of interstate commerce, does not derogate from the complete and paramount authority of Congress over the latter or preclude the federal power from being exerted to prevent the intrastate operations of such carriers from being made a means of injury to that which has been confided to federal care. Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme within the national field."

See also *United States* v. *New York Central R. Co.* 272 U. S. 457, 464.

The decisions from which we have quoted leave no doubt of the power of Congress to regulate those phases of a carrier's business which are purely intrastate in character if such regulation is necessary to the proper regulation and control of its interstate business. On the same principle it was held within the power of Congress

to regulate the sale of live stock in stock yards, where the stock yards constituted public utilities to promote the flow of interstate commerce, even though many of the transactions subject to such regulation were intrastate in character. *Stafford* v. *Wallace* 258 U. S. 495. This case is of peculiar importance here for the regulatory statute was sustained in large part on the reasoning of *Swift* v. *United States* 196 U. S. 375, a prosecution under the Sherman Act, the court holding, "If Congress could provide for punishment or restraint of such conspiracies after their formation through the Anti-Trust Law as in the Swift Case, certainly it may provide regulation to prevent their formation." 258 U. S. at 520. By (329) identical reasoning, if labor disturbances of employees such as those who are involved here, warrant the exercise of injunctive power to prevent interference with interstate commerce, as was asserted by the defendant here in the shopmen's strike of 1922 and as was held in *United States* v. *Railway Employees' Department* 283 Fed. 479 and 290 Fed. 978, certainly Congress can take appropriate steps to prevent such interference in advance of the disturbance. A statute providing for collective bargaining between interstate carriers and their employees is an appropriate means to this end; and it is no objection to such statute, in law or in reason, that some of the employees concerned in such bargaining may be engaged in the intrastate activities of the carrier.

So far as the question here under discussion is concerned, it is not at all different from that arising with respect to the Railway Labor Act of 1926 prior to its amendment, which was upheld against attack directed at its constitutionality in *Texas & N. O. R. Co.* v. *Railway Clerks, supra*, 281 U. S. 548, 570. While the precise constitutional point here discussed was not raised in that case, the court brushed aside all contention that the act was unconstitutional, saying:

"We entertain no doubt of the constitutional au-

thority of Congress to enact the prohibition. The power to regulate commerce is the power to enact 'all appropriate legislation' for its 'protection and advancement' (*The Daniel Ball*, 10 Wall. 557, 564); to adopt measures 'to promote its growth and insure its safety' (*County of Mobile* v. *Kimball*, 102 U. S. 691, 696, 697); to 'foster, protect, control and restrain' (*Second Employers' Liability Cases*, 223 U. S. 1, 47). *Exercising this authority, Congress may facilitate the amicable settlement of disputes which threaten the service of the necessary agencies of interstate transportation.* In shaping its legislation to this end, Congress was entitled to take cognizance of actual conditions and to address itself to practicable measures. The legality of collective action on the part of employees in order to safeguard their proper interests is not to be disputed. It has long been recognized (330) that employees are entitled to organize for the purpose of securing the redress of grievances and to promote agreements with employers relating to rates of pay and conditions of work. *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184, 209. Congress was not required to ignore this right of the employees but could safeguard it and seek to make their appropriate collective action an instrument of peace rather than of strife." (Italics ours).

In the later case of *Railroad Retirement Board* v. *Alton Railroad* 295 U. S. 330, 369, it was said in the majority opinion: "The railway labor act was upheld by this court upon the express ground that to facilitate the amicable settlement of disputes which threatened the service of the necessary agencies of interstate transportation tended to prevent interruptions of service and was therefore within the delegated power of regulation."

In view of what has been said, little consideration need be given to the argument that, since the act applies to employees of interstate carriers not engaged in interstate commerce, as well as to those so engaged, it must be declared void in toto as it is not possible to make a separation between the constitutional and unconstitutional features of the act. It is hard to imagine what class of employees of an interstate carrier might not

present a danger of disturbance of its interstate business through strikes or other labor disturbances and thus afford a proper field for the application of the power of Congress. No such class is suggested, except the "back shop" employees before the court, as to whom we have seen that the suggestion cannot be entertained. If, however, there are such employees, it would seem, to use the language of the Chief Justice in the *Railroad Retirement Case* 295 U. S. at 389, that "In the administration of the Act there would be ample opportunity to make all necessary distinctions between employees engaged in interstate commerce and any others who might be found to be otherwise exclusively employed, so as to exclude the latter from its benefits without impairing the general (331) operation of the Act."

The record in the Railroad Retirement Case shows that of over a million employees engaged in the service of the interstate carriers of the country, only 211,107 are classified as not engaged in interstate transportation. Of these, 86,493 are "back shop", or maintenance of equipment employees, and 36,996 are auditing, accounting and bookkeeping employees; and as pointed out by the Chief Justice (295 U. S. at 388) all of these "did have such relation to the activities of the carriers in interstate commerce as to bring them within the range of Congressional power". This leaves less than 90,000 out of the more than a million employees of the interstate carriers who are not engaged in interstate commerce; and, even if these are not within the regulatory power of Congress, it is not thinkable that it could have been intended that the act should fail for that reason when it is expressly provided therein (44 Stat. 587):

"If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act, and the application of such provision to other persons or circumstances, shall not be affected thereby."

Such employees would be outside the realm of federal power only on the ground that disputes and strikes on their part would not interfere with interstate commerce; and since the purpose of the act is to avoid such interference, its intention would not be in any way violated by excluding them from consideration in the administration of the act.

3. QUESTIONS UNDER THE 5TH AMENDMENT.

The validity of the Railway Labor Act, prior to its amendment by the Act of 1934, was upheld by the Su- (332) preme Court, with special reference to the 5th Amendment, in *Texas & N. O. R. Co.* v. *Railway Clerks, supra*; and we do not think that anything in the 1934 act conflicts with rights of property or freedom of contract as guaranteed by the due process clause of that amendment. The act does not require of the carrier the making of any agreement. It does not interfere with the normal exercise of the right of the carrier to select its employees or to discharge them. The requirement that the carrier recognize and treat with the chosen representatives of the employees, is but an attempt to "facilitate the amicable settlement of disputes which threaten the service of the necessary agencies of interstate transportation", as approved by the Supreme Court in the Railway Clerks Case.

It is argued that, as the carrier may refuse to contract with the representatives of the employees, it may refuse to treat with them with a view of contracting, and that, at all events, a requirement to treat is but a vain thing if treaty does not result in contract. As pointed out above, however, the representatives of the employees have many duties to perform under the act looking to the settlement of disputes and the avoidance of industrial conflict, other than the making of contracts; and it is important that their status be determined to the end

that these duties may be properly performed, and that the carrier cooperate with them in performing such duties. We cannot see anything arbitrary or unreasonable in requiring that the carrier recognize the representatives of its employees and treat with them as such; and we do not understand on what theory the carrier can be said to be deprived of liberty or property by such requirement. It is but a reasonable regulation in aid of collective bargaining, which, as said by the Supreme Court, in the Railway Clerk's Case, Congress has chosen (333) to promote as an instrument of industrial peace.

4. THE QUESTION AS TO MAJORITY.

As there is no appeal from the action of the Court in the case of the election held by the Carmen and Coach Cleaners, we need not consider the effect of an election in which the majority of a craft does not participate, and we need not and do not decide whether a majority of the votes cast is sufficient for a choice in such case. In the case of the Blacksmiths, where a majority of the craft participated in the election, we think that a majority of the votes cast was sufficient to determine a choice of representatives even though these did not constitute a majority of all of those eligible to vote.

One of the purposes of the statutory provisions under consideration is to guarantee to the employees of interstate carriers the right of self government in matters relating to organization for collective bargaining. The act not only recognizes the right of employees to bargain collectively and safeguards their right to choose representatives for this purpose without interference or coercion from the employer, but also prescribes the principle of majority rule in the selection of such representatives, providing that: "The majority of any craft or class shall have the right to determine who shall be the representative of the class or craft for the purposes of this act." (48 Stat. 1187, 45 USCA

152(fourth). In case a dispute arises as to who are the representatives, it provides in a subsequent section (45 USCA 152(ninth), 48 Stat. 1188) that the Mediation Board, upon the request of either party, shall investigate the dispute and certify the representatives authorized to represent the employees. For the purpose of discharging this duty, the Board is authorized to conduct an election by secret ballot to ascertain the employees' choice of representatives. The question is whether, in such an election, the choice is dependent upon a majority of all of those qualified to vote, or whether, in cases where a majority of those qualified to vote participate in the election, a majority of the votes cast is sufficient. (334) We think that the latter is the rule to be applied.

If a majority of those qualified to vote is required, elections must frequently fail as a result of the failure of those qualified to vote to participate in them. If the employees are already represented, the failure to vote will be a vote against change; and where the employer, as in the case at bar, is opposed to change, the effect of the secret ballot will be in large measure nullified. In the case of the Blacksmiths' election which is before us, for example, it appears that, of 46 members qualified to vote, 22 voted for the Federation, 8 for the Association, and 16 did not vote. If a majority of those qualified to vote be necessary to a choice in such election, the action of these sixteen in not voting will be given the same effect as though they had voted for the Association, the existing representative; and the fact that they had abstained from voting and thereby favored the plan of the employer would be known to him. If there had been no existing representative, the voting would have resulted in no representative being chosen, and the purposes for which the act was so carefully drawn, so far as this craft is concerned, would have been impossible of attainment.

We do not think the act should be given an interpretation leading to such results, if any other interpreta-

tion is possible (*Sorrells* v. *United States* 287 U. S. 435, 446); and we think that such other interpretation is not only possible but is required by the language of the statute and by its reason and spirit. The clause of the act which we have quoted does not in terms require a majority vote of the craft. It merely prescribes the political principle of majority rule. Another section of the act provides the means of determining the majority, the political device of the secret election. Nothing is said as to whether the choice at such election shall be by a majority of the qualified voters, or merely by a majority of the votes cast; but the act clearly does not contemplate (335) that there shall be such a failure of election as could easily result if the obtaining of a majority of the qualified voters were required. The universal rule as to elections of officers and representatives is that a majority of the votes cast elects; and that those not voting are presumed to acquiesce in the choice of the majority who do vote. Popular government would hardly be workable on any other basis. As was well said by Chief Justice Waite, speaking for the Supreme Court, in *County of Cass* v. *Johnston* 95 U. S. 360, 369:

"This we understand to be the established rule as to the effect of elections, in the absence of any statutory regulation to the contrary. All qualified voters who absent themselves from an election duly called are presumed to assent to the expressed will of the majority of those voting, unless the law providing for the election otherwise declares. Any other rule would be productive of the greatest inconvenience, and ought not to be adopted, unless the legislative will to that effect is clearly expressed."

For cases in which it is held that a majority of those voting is sufficient, see also *St. Joseph Township* v. *Rogers* 16 Wall. 644; *Carroll County* v. *Smith* 111 U. S. 556; *Murdock* v. *Strange* 99 Md. 89, 57 Atl. 628, 3 Ann. Cas. 66; *L. & N. R. Co.* v. *County of Davidson* 1 Sneed 637, 62 Am. Dec. 424 and note; *Montgomery County*

Fiscal Court v. *Trimble* 104 Ky. 629, 47 S. W. 773, 42 L. R. A. 738; *Smith* v. *Proctor* 130 N. Y. 319, 14 L. R. A. 403; *Oldknow* v. *Wainwright*, 2 Burr. 1017 (per Mansfield, C. J.); *Applequist* v. *Swedish Evangelical Lutheran Church* 154 Wash. 356, 282 Pa. 224; *First Baptist Church* v. *Ward* (Tex.) 290 S. W. 828; 9 R. C. L. p. 1115-1116, and notes in 6 L. R. A. 308, 51 Am. St. Rep. 847, 13 Ann. Cas. 416. For cases holding that the general parliamentary rule that the majority vote of a quorum is sufficient, see *United States* v. *Ballin* 144 U. S. 1; *Missouri P. R. Co.* v. *Kansas* 248 U. S. 276; *In re Opinions of the Justices* (Ala.) 152 So. 901; *Ladies of the Maccabees* v. (336) *Hand* 235 Mich. 459, 209 N. W. 581. For cases holding that a majority of all the members of a commission or legislative body are necessary to a valid action, see *State* v. *Gould* 31 Minn. 189, 17 N. W. 276; *Chicago R. Co.* v. *Commerce Commission ex rel C. M. C. Co.* 336 Ill. 51, 167 N. E. 840; *Wood* v. *Gordon* 52 S. E. 260 (W. Va.).

We see no reason why the act should not be interpreted as contemplating that this well settled rule of elections should be applied in the case of the employees' election for which it provides, in cases like this where a majority of those qualified to vote participate in the election. Such a rule is fair and just to all parties. It gives every employee an opportunity to express his choice. It preserves the secrecy of elections. And it prevents the breaking down of the plan of collective bargaining which it was the purpose of the act to set up. The rule as applied by the judge below would, on the principles applicable to a quorum in legislative assemblies, limit the choice by the majority of those voting to cases where a majority of the qualified voters participate in the election. Without passing upon the validity of the limitation, we think that there can be no question as to the validity of the choice where its conditions are complied with.

It is said that the act does not necessarily require

an election of the representatives of the employees by secret ballot since paragraphs 3 and 4 of section 2 of the act, 45 USCA Sup. 152, merely provide that representatives of the respective parties (employer and employees) shall be designated without interference, influence or coercion by either party over the other; and that the employees shall have the right to organize and bargain through representatives of their own choosing, no method of choice being prescribed, the only provision being that "the majority of any craft or class of employees shall have the right to determine who shall be the representatives" thereof; and that it is only where a dispute arises amongst the employees as to who are their representa-
(337) tives, that it becomes the duty of the Mediation Board under paragraph 9 of section 2 to investigate the dispute and to certify the names of the individuals designated to represent the employees; and that even in such case, the Board may either take a secret ballot of the employees involved or utilize any other appropriate method of ascertaining the names of the representatives. Hence it is suggested that the provision for secret ballot in the discretion of the Board should not change the interpretation of the clause that the majority of any craft shall determine its representatives, especially when the number of voters is fixed and definite and all of them have a special personal interest in the outcome; and if considerations of convenience and effectiveness of the statute are to influence the interpretation, that it should be borne in mind that if the majority of the eligible voters must agree upon the selection of the representative, there will be greater stability in employee representation, for where less than a majority approve a designated representative, there is a tendency for the losing party to seek another election, and the issue may not be regarded as definitely settled until a majority of the eligible voters agree upon their choice. Finally it is pointed out that the literal interpretation was adopted by the Mediation Board before the decision of the Dis-

trict Judge in the instant case. We have carefully considered these arguments, but are of the opinion, for the reasons above stated, that the act should not be given so strict a construction, and that if a majority of the craft participate in an election, the majority of those voting is sufficient. Whether the choice of a majority of those voting would also be valid even if a majority of the eligible voters do not participate in the election is a question we need not now decide.

We need not consider at any length the criticism that both the mandatory and prohibitory features of the decree are without time limit, as the reasonable interpretation of the language used is that the defendant is (338) directed to treat with the Federation so long as it is the representative of its employees and is restrained from treating with others as their representative so long as the Federation occupies that position. Nothing in the decree is to be construed as preventing the employees from choosing other representatives for the purpose of collective bargaining, at any time in the future, if they desire to do so, or as preventing the defendant from treating with such representatives when they are so chosen.

For the reasons stated, the decree appealed from will be affirmed.

Affirmed.

(339) **DECREE**

Filed and Entered June 18, 1936.

UNITED STATES CIRCUIT COURT OF APPEALS

FOURTH CIRCUIT

No. 4005.

The Virginian Railway Company, Appellant,

versus.

System Federation No. 40, Railway Employes Department of the American Federation of Labor, in its own right and as the actual and legally designated representatives of all Machinists, Boilermakers, Blacksmiths, Sheet Metal Workers, Carmen, Coach Cleaners, and their respective specialists, apprentices, and helpers in the employ of The Virginian Railway Company in the States of Virginia and West Virginia, E. J. Preston, individually, as System General Chairman and as General Chairman for the Machinists, Andy Duncan, individually and as General Chairman for the Boilermakers, W. S. Penturff, individually and as General Chairman for the Blacksmiths, W. M. Sarver, individually and as General Chairman for the Sheet Metal Workers, A. P. Wyatt, individually and as General Chairman for the Electricians, and P. L. Allen, individually and as General Chairman for the Carmen and Coach Cleaners, Appellees.

APPEAL from the District Court of the United States for the Eastern District of Virginia.

THIS CAUSE came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed with costs.

June 18, 1936.

JOHN J. PARKER,
Senior Circuit Judge.

July 4, 1936, petition of appellant for a stay of the (340) mandate pending application in the Supreme Court for a writ of certiorari is filed.

ORDER STAYING MANDATE

Filed July 4, 1936.

(Style of Court and Title Omitted.)

UPON THE APPLICATION of Appellant, by its counsel, and for good cause shown,

IT IS ORDERED that the mandate of this Court in the above entitled cause be, and the same is hereby, stayed pending the application of the said Appellant in the Supreme Court of the United States for a writ of certiorari to this Court, unless otherwise ordered by this or the said Supreme Court, and provided said application is filed in the said Supreme Court within 60 days from this date.

July 4th, 1936.

JOHN J. PARKER,
Senior Circuit Judge.

(341) **CLERK'S CERTIFICATE**

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, CLAUDE M. DEAN, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true copy of the entire record and proceedings in the therein entitled cause, as the same remain upon the records and files of the said Circuit Court of Appeals.

IN TESTIMONY WHEREOF, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Virginia, this 13th day of July, A. D., 1936.

(Seal of Court)

CLAUDE M. DEAN,
Clerk, U. S. Circuit Court of Appeals, Fourth Circuit.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 12, 1936

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE
AUG 31
CLMOR

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 324

THE VIRGINIAN RAILWAY COMPANY,
Petitioner,

v.

SYSTEM FEDERATION NO. 40, RAILWAY EMPLOYEES DEPARTMENT OF THE AMERICAN FEDERATION OF LABOR, IN ITS OWN RIGHT AND AS THE ACTUAL AND LEGALLY DESIGNATED REPRESENTATIVE OF ALL MACHINISTS, BOILERMAKERS, BLACKSMITHS, SHEET METAL WORKERS, CARMEN, COACH CLEANERS, AND THEIR RESPECTIVE SPECIALISTS, APPRENTICES, AND HELPERS IN THE EMPLOY OF THE VIRGINIAN RAILWAY COMPANY IN THE STATES OF VIRGINIA AND WEST VIRGINIA, E. J. PRESTON, INDIVIDUALLY, AS SYSTEM GENERAL CHAIRMAN AND AS GENERAL CHAIRMAN FOR THE MACHINISTS, ANDY DUNCAN, INDIVIDUALLY AND AS GENERAL CHAIRMAN FOR THE BOILERMAKERS, W. S. PENTURFF, INDIVIDUALLY AND AS GENERAL CHAIRMAN FOR THE BLACKSMITHS, W. M. SARVER, INDIVIDUALLY AND AS GENERAL CHAIRMAN FOR THE SHEET METAL WORKERS, A. P. WYATT, INDIVIDUALLY AND AS GENERAL CHAIRMAN FOR THE ELECTRICIANS, AND P. L. ALLEN, INDIVIDUALLY AND AS GENERAL CHAIRMAN FOR THE CARMEN AND COACH CLEANERS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

JAMES PIPER,
H. T. HALL,
W. H. T. LOYALL,
JOHN C. DONNALLY,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. .....

THE VIRGINIAN RAILWAY COMPANY,

Petitioner,

v.

SYSTEM FEDERATION NO. 40, RAILWAY EMPLOYEES DEPARTMENT OF THE AMERICAN FEDERATION OF LABOR, IN ITS OWN RIGHT AND AS THE ACTUAL AND LEGALLY DESIGNATED REPRESENTATIVE OF ALL MACHINISTS, BOILERMAKERS, BLACKSMITHS, SHEET METAL WORKERS, CARMEN, COACH CLEANERS, AND THEIR RESPECTIVE SPECIALISTS, APPRENTICES, AND HELPERS IN THE EMPLOY OF THE VIRGINIAN RAILWAY COMPANY IN THE STATES OF VIRGINIA AND WEST VIRGINIA, E. J. PRESTON, INDIVIDUALLY, AS SYSTEM GENERAL CHAIRMAN AND AS GENERAL CHAIRMAN FOR THE MACHINISTS, ANDY DUNCAN, INDIVIDUALLY AND AS GENERAL CHAIRMAN FOR THE BOILERMAKERS, W. S. PENTURFF, INDIVIDUALLY AND AS GENERAL CHAIRMAN FOR THE BLACKSMITHS, W. M. SARVER, INDIVIDUALLY AND AS GENERAL CHAIRMAN FOR THE SHEET METAL WORKERS, A. P. WYATT, INDIVIDUALLY AND AS GENERAL CHAIRMAN FOR THE ELECTRICIANS, AND P. L. ALLEN, INDIVIDUALLY AND AS GENERAL CHAIRMAN FOR THE CARMEN AND COACH CLEANERS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

The Virginian Railway Company respectfully prays that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Fourth Circuit entered in the above entitled case on June 18, 1936, affirming the decree of the District Court of the United States for the Eastern District of Virginia.

OPINIONS BELOW.

The opinion of the District Court of the United States for the Eastern District of Virginia (R. 254-279) is reported in 11 F. Supp. 621. The opinion of the United States Circuit Court of Appeals for the Fourth Circuit (R. 311-339) has not yet been reported.

JURISDICTION.

The decree of the United States Circuit Court of Appeals for the Fourth Circuit (R. 340) was entered on June 18, 1936. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

1. Whether Section 2, Ninth, of the Railway Labor Act, which provides that a carrier shall treat with the representative of employees certified by the National Mediation Board thereunder, imposes a legally enforceable obligation.

2. Whether Section 2, Ninth, of the Railway Labor Act, as construed by the Circuit Court of Appeals to im-

pose upon carriers a positive, obligatory requirement to treat with a representative so certified as the representative of all the employees in the craft or class, is unconstitutional in that it deprives carriers of their property and liberty of contract in violation of the Fifth Amendment of the Constitution of the United States.

3. Whether the Railway Labor Act is unconstitutional in its entirety in that it attempts to regulate labor relations between carriers and their back-shop employees engaged solely in activities intrastate in character which do not directly affect or burden interstate commerce.

4. Whether Section 2, Fourth, of the Railway Labor Act requires, in the case of an election to determine who shall be the representative of a craft or class, that the representative receive the votes of a majority of all the eligible members of such craft or class; or whether a majority of those voting is sufficient to elect where a majority of those qualified to vote participates in the election.

5. Whether the certification of September 13, 1934, of the National Mediation Board under Section 2, Ninth, of the Railway Labor Act is a nullity because it fails to show that a majority of any craft or class of employees voted in favor of System Federation No. 40, Railway Employees Department of the American Federation of Labor (hereinafter called the Federation), or even that such a majority participated in the election.

6. Whether said certification of the National Mediation Board is a nullity because it improperly includes votes of back-shop employees, engaged solely in intrastate activities not directly affecting or burdening interstate commerce and therefore not subject to Federal regulation, it being impossible to tell what the result of the election would have been if these votes had not been counted.

7. Whether an injunction bottomed on publicity given by the petitioner to the existence of, and the facts involved in, a labor dispute and on acts of employees not participated in, ratified or authorized by the petitioner should have been issued, particularly in view of the provisions of Sections 4 (e), 6 and 7 (a) of the Norris-LaGuardia Act.

8. Whether Section 9 of the Norris-LaGuardia Act prohibits the granting by a court of the United States of a mandatory injunction in a case involving or growing out of a labor dispute.

STATUTES INVOLVED.

The statutes involved will be found in the Appendix, *infra*, pp. 31-43.

STATEMENT.

The mechanical department employees of the petitioner comprise six shop crafts (R. 31, 244). These shop crafts are divided between (1) so-called "back-shop" employees, whose work consists solely of "classified repairs" and "store order work" (with the exception of one man who makes "running repairs" on a switch engine maintained at the back shop) and (2) employees engaged in making "running repairs". "Classified repairs" are heavy repairs made to locomotives and cars, such as rebuilding and putting them in shape for months of service. For the purpose of classified repairs the locomotives and cars are withdrawn from service for an average of approximately 105 days in the case of locomotives and for an average of approximately 109 days in the case of cars. The petitioner has had like work on the locomotives done by the Baldwin Locomotive Works and the Virginia Bridge and Iron Works has rebuilt a great many of its cars. "Store order work" consists of manufacturing material (such as rivets and repair parts) to be placed in

stores at different points on the railroad. If the petitioner can make these articles more cheaply than it can buy them they are made at its back shop; otherwise they are bought on the market. (R. 177-180). "Running repairs" are repairs to equipment other than classified repairs. Approximately one-third of the mechanical department employees are back-shop employees. The back shop, at which all the back-shop employees are employed, is at Princeton, West Virginia. (R. 177, 196).

On July 3, 1922, the United States Railroad Labor Board adopted a resolution calling upon the employees of carriers generally to organize into associations to function in the representation of said employees in disputes involving rules, wages and grievances. The petitioner received an official copy of the resolution (R. 133) and gave information in regard to it to its employees in a bulletin (R. 145). (The record does not disclose the form or contents of this bulletin.) Subsequently the mechanical department employees of the petitioner formed such an association (R. 134), which is hereinafter referred to as the Association, and adopted a written constitution effective October 1, 1922 (R. 224). Beyond posting the bulletin and assisting in "smoothing out" the constitution framed by the employees the petitioner had nothing to do with the organization of the Association (R. 144, 145, 180). The Association and the petitioner then negotiated and executed a contract covering rules, wages and grievances, effective November 15, 1922, and to continue in effect for one year and thereafter until changed as therein provided (R. 244). The contract has not been terminated (R. 142).

The petitioner assisted the Association to function by furnishing meeting places (R. 104), transmitting its notices to members through the company mail (R. 104, 112), paying travelling expenses (R. 115) in an amount

averaging approximately $100 a year (R. 145) and possibly furnishing printed ballots for the elections (R. 81, 111). It is not contended that the petitioner continued any such financial assistance after it became unlawful for it to give it. The petitioner did not interfere in any way with the selection of officers of the Association (R. 110, 111, 120, 142, 167) or with its policies (R. 134, 167).

In the fall of 1933 the American Federation of Labor instituted an intensive campaign for membership among the mechanical department employees of the petitioner (R. 76-77). While this was going on the petitioner, on January 20, 1934, issued a bulletin, the substance of which was that the reports being circulated that the law or the Federal Coordinator of Transportation had outlawed company unions (such as the Association) were unfounded (R. 180-181, 195-196). Other railroads issued similar statements (R. 181). The bulletin was identical with the notice which the Eastern Regional Coordination Committee decided to recommend to the Eastern Presidents' Conference for posting for the information of employees (R. 187-189).

In the spring and summer of 1934 the Federation made various attempts to supplant the Association as representative of the mechanical department employees. (R. 233, 234, 235, 239). Under date of July 11, 1934, while these attempts were continuing, the petitioner distributed to its employees in pamphlet form, a statement (known in the case as the Sasser statement) purporting to be "a plain statement of the facts in connection with the proposed change" from "Company Employee Representation to National Organization Representation". It asked the employees to give due consideration to these facts, adding, however, that the employees were "entirely free to exercise their choice of representatives, free from fear or favor from their employer" (R. 197).

On August 20, 1934, and subsequent days an election was held on the railroad, conducted by a representative of the National Mediation Board, to determine for each of the six shop crafts whether the employees therein, including the back-shop employees, desired representation by the Federation or by the Association (R. 31, 88). Under date of September 13, 1934, the National Mediation Board issued a certification reciting the votes by crafts for the two unions and on the basis thereof certifying that the Federation had "been duly designated and authorized to represent the mechanical department employees of The Virginian Railway Company" (R. 13). The certification does not show the number of eligible voters or otherwise indicate whether or not in any craft the Federation was the choice of the majority or even whether the majority voted in the election. The number of eligible voters was stipulated at the trial. From this stipulation it appears that in two of the crafts, namely the blacksmiths and the carmen and coach cleaners, a majority did not vote for the Federation and in one of them, namely the carmen and coach cleaners, that less than a majority voted in the election (R. 196). Furthermore, it is impossible to tell from the certification or in any other way what the result of the election would have been in any craft without the votes of the back-shop employees.

In the fall of 1934 a union known as the Independent Shop Crafts Association (hereinafter called the Independent) was formed (R. 167-169). It was not organized by the petitioner and the petitioner did not function with it (R. 148-149).

There is evidence that Nevins, the petitioner's master mechanic at Victoria, had a conversation with an employee under him in which he persuaded the employee

not to vote for the Federation (R. 108-109), and, after the election, that Forbes, car foreman at Elmore, obtained petitions repudiating the Federation from several employees and that two workmen on the job circulated several applications for membership in the Independent during working hours (R. 116-120, 122-124), one of them saying he thought it would be best to sign up because the petitioner was not going to recognize the Federation (R. 117).

At a conference on December 27, 1934, the Federation presented to the petitioner for consideration a draft of agreement transferring to the Federation the existing agreement with the Association, with clauses extending its scope to include employees not members of the mechanical department (R. 61, 74, 78). No subsequent conference was held (R. 79).

On May 2, 1935, the respondents instituted suit in the District Court of the United States for the Eastern District of Virginia asking that the petitioner be required to recognize and treat with the Federation as the representative of the mechanical department employees and (among other things) be enjoined from attempting to influence or interfere with said employees thereafter in their choice of representatives for the purpose of collective bargaining (R. 2). On May 20, 1935, the petitioner filed a motion to dismiss (R. 37) and an answer (R. 39). After hearing, the District Court on July 24, 1935, filed an opinion (R. 254) holding that the petitioner should be enjoined from interfering with the respondents and the members of the crafts involved in the matter of self organization and should be required to recognize and treat with the Federation as the representative of the five crafts in which a majority of the eligible voters had participated in the election, that is

to say, all the crafts except the carmen and coach cleaners.

On August 23, 1935, the District Court entered a final decree (R. 279), overruling the motion to dismiss, making findings of fact and granting relief. The court found in the decree (R. 280-281) that the Federation was the duly authorized representative of the petitioner's mechanical department employees, except the carmen and coach cleaners, "having been designated as such" by the certification aforesaid, and that the petitioner, in violation of Section 2 of the Railway Labor Act, had failed to treat with it as such. Pursuant to such findings the court by paragraph 1 of the decree (R. 282) ordered the petitioner to treat with the Federation "so certified as aforesaid".

The court further found in the decree (R. 281-282) that "by means of personal interviews, posted bulletins and by the circulation of a pamphlet [the Sasser statement] calling the attention of its mechanical department employees to the disadvantages attendant upon membership in a standard labor organization and the advantages of a company union, the defendant sought to influence its mechanical department employees against any participation in or association with a standard labor organization and thereby to maintain a mere nominal association or union supported wholly by the defendant, and in the further effort to prevent its mechanical department employees from exercising their free and untrammelled right to choose their own representative"; that the petitioner, by and through its officers, agents and servants, undertook to have the certification aforesaid altered, changed or revoked, and caused the Independent to be organized, all in violation of the Railway Labor Act; and that it continued and now continues by the means aforesaid to endeavor to deprive its mechanical department employees

of any and all right to independent representation, in violation of the Railway Labor Act. Pursuant to the findings aforesaid, the court by paragraph 2 of the decree (R. 282-283) enjoined the petitioner, from interfering with, influencing or coercing any of its mechanical department employees with respect to their right of selecting or designating representatives; from organizing, promoting, fostering or being in anywise concerned with the organization, fostering, maintenance or encouraging any association of such employees with the intent or with the purpose of in anywise interfering with the Federation, or any successor representative, in violation of the Railway Labor Act; from preventing or discouraging such employees from becoming or remaining members of the Federation; and from "entering into any contract, undertaking or agreement of whatsoever kind concerning rules, rates of pay or working conditions affecting its mechanical department employees [which include the carmen and coach cleaners], save and except only with the complainant, System Federation No. 40". There is no evidence that the petitioner participated in, authorized or ratified the acts of the master mechanic, car foreman or workmen testified to or any other acts tending to support the findings summarized in this paragraph, or even that it had any knowledge of them, other than the assistance in "smoothing out" the constitution of the Association in 1922, the two bulletins, the Sasser statement, and the financial assistance formerly given to the Association. The uncontradicted testimony is to the contrary (R. 144, 145, 159, 176, 180, 186).

The Circuit Court of Appeals in an opinion filed June 18, 1936, (R. 311) held that the decree of the District Court should be affirmed and affirmed it by decree entered the same day (R. 340).

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

1. In holding that Section 2, Ninth, of the Railway Labor Act, which provides that a carrier shall treat with the representative of employees certified by the National Mediation Board thereunder, imposes a legally enforceable obligation.

2. In failing to hold that Section 2, Ninth, of the Railway Labor Act, as construed by the Circuit Court of Appeals to impose upon carriers a positive, obligatory requirement to treat with a representative so certified as the representative of all the employees in the craft or class, is unconstitutional in that it deprives carriers of their property and liberty of contract in violation of the Fifth Amendment of the Constitution of the United States.

3. In failing to hold that the Railway Labor Act is unconstitutional in its entirety in that it attempts to regulate labor relations between carriers and their back shop employees engaged solely in activities intrastate in character, which do not directly affect or burden interstate commerce.

4. In holding that Section 2, Fourth, of the Railway Labor Act does not require, in the case of an election to determine who shall be the representative of a craft or class, that the representative receive the votes of a majority of all the eligible members of such craft or class; and in holding that a majority of those voting is sufficient to elect where a majority of those qualified to vote participates in the election.

5. In failing to hold that the certification of September 13, 1934, of the National Mediation Board under Section 2, Ninth, of the Railway Labor Act is a nullity because it

fails to show that a majority of any craft or class of employees voted in favor of the Federation, or even that such a majority participated in the election.

6. In failing to hold that said certification of the National Mediation Board is a nullity because it improperly includes votes of back-shop employees, engaged solely in intrastate activities not directly affecting or burdening interstate commerce and therefore not subject to Federal regulation, even when it is impossible to tell what the result of the election would have been if these votes had not been counted.

7. In failing to hold that an injunction bottomed on publicity given by the petitioner to the existence of, and the facts involved in, a labor dispute and on acts of employees not participated in, ratified or authorized by the petitioner was improperly granted, particularly in view of the provisions of Sections 4 (e), 6 and 7 (a) of the Norris-LaGuardia Act.

8. In holding that Section 9 of the Norris-LaGuardia Act does not prohibit the granting by a Court of the United States of a mandatory injunction in a case involving or growing out of a labor dispute.

9. In affirming the decree of the District Court.

REASONS FOR GRANTING THE WRIT.

1. Whether or not Section 2, Ninth, imposes a legally enforceable obligation to treat is a question of federal law of far reaching importance in the administration of the Railway Labor Act, which has not been, but should in the national public interest be, settled by this Court.

Section 2, Ninth, was inserted in the Railway Labor Act by the 1934 amendments under the heading "Gen-

eral Duties". It provides that upon the receipt by a carrier from the Mediation Board of a certification of a representative of employees, "the carrier *shall treat** with the representative so certified as the representative of the craft or class for the purposes of this Act". This Court has held that a somewhat similar statute, namely, Section 301 of the Transportation Act, 1920, providing that "disputes *shall be considered* and, if possible, decided *in conference* between representatives designated and authorized so to confer by the carriers, or the employees or subordinate officials thereof, directly interested in the dispute", imposed a legally unenforceable duty. This decision was made in the face of an argument identical in substance to the reasoning of the Circuit Court of Appeals in this case (R. 317), namely, that it would "make the act meaningless and wholly ineffective if under the act the parties may not be forced to a conference * * *" (*Pennsylvania Railroad System v. Pennsylvania Railroad Company*, 267 U. S. 203, 216-217 (1925)). It is submitted that the Circuit Court of Appeals should have similarly held that Section 2, Ninth, imposed a legally unenforceable duty, and that the mandatory injunction to treat awarded by paragraph 1 of the decree of the District Court should accordingly be vacated. The question was not determined adversely to this contention by anything in *Texas & N. O. R. Co. v. Brotherhood of Ry. & S. S. Clerks*, 281 U. S. 548 (1930). That case did not overrule the *Pennsylvania* case or question its application to an imperfect obligation not enforceable in terms. To the contrary this Court said in the *Texas* case (at page 568):

> "While an affirmative declaration of duty contained in a legislative enactment may be of imperfect obligation because not enforceable in terms, a

* It may be assumed that all italics are supplied.

> definite statutory prohibition of conduct which would thwart the declared purpose of the legislation cannot be disregarded."

It is submitted that a direction to treat is no less an imperfect obligation unenforceable in terms than a direction to consider disputes in conference. (It is true that in the *Texas* case there was an order in contempt proceedings directing the railroad to reinstate the Brotherhood as the representative of the employees until an election could be held. This order, however, was not made to enforce a statutory obligation, but to require the restoration of the *status quo* as a condition of purging the railroad of contempt.)

It should also be noted that if Section 2, Ninth, is construed to impose a legally enforceable duty to treat, an anomalous result follows, since Section 2, Ninth, imposes a duty to treat only when a representative of the employees has been certified by the Mediation Board, and the Mediation Board is authorized to certify a representative only in case of a dispute among the carrier's employees as to who the representative shall be. Thus, under this construction, when there is such a dispute and the Mediation Board has so certified, the carrier may be compelled to treat with the representative so certified; but if there is no such dispute—as where the employees are in unanimous agreement as to who the representative shall be—the carrier may not be compelled to treat because in such case Section 2, Ninth, is inapplicable.

Furthermore, if Section 2, Ninth, imposes a legally enforceable requirement to treat, it violates the due process clause of the Fifth Amendment, as pointed out *infra* (pp. 14-19), and this is an added reason for construing it to impose only an unenforceable duty.

2. Both the District Court and the Circuit Court of Appeals have construed Section 2, Ninth, of the Railway

Labor Act as imposing a legally enforceable obligation upon the petitioner to treat with the representative certified by the Mediation Board and as precluding the petitioner from entering into any contract, undertaking or agreement concerning rules, rates of pay or working conditions affecting its mechanical department employees except with such representative. Section 2, Ninth, of the Act, so construed, violates, it is submitted, the due process clause of the Fifth Amendment.

(a) This Court has long held that liberty of contract, and particularly the freedom of employers and employees to contract together on equal and voluntary terms with respect to their affairs, partakes of the nature of both liberty and property and falls under the same constitutional protection as property rights of a more concrete nature. *Lochner v. New York*, 198 U. S. 45, 53 (1905); *Adair v. United States*, 208 U. S. 161, 173 (1908); *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 250 (1917). The liberty to refrain from entering into contracts is a part of the liberty of contract, so that legislation which compels the making of contractual agreements is as much a deprivation of liberty and property as is legislation forbidding or interfering with such agreements. *Coppage v. Kansas*, 236 U. S. 1, 20 (1915). In accordance with this principle, this Court said in the *Adair* case (at pages 174-175):

> "* * * it is not within the functions of government—at least, in the absence of contract between the parties—to compel any person, in the course of his business and against his will, to accept or retain the personal services of another * * *. In all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land."

Furthermore in the *Adair* case this Court (at page 173) quoted with approval the following from Cooley on Torts:

> "It is a part of every man's civil rights that he be left at liberty *to refuse business relations* with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice. With his reasons neither the public nor third persons have any legal concern. It is also his right to have *business relations* with anyone with whom he can make contracts, and, if he is wrongfully deprived of this right by others, he is entitled to redress."

Thus liberty of contract includes liberty to refuse to have business relations to any extent.

The 1934 amendments to the Railway Labor Act in some of their provisions squarely and unequivocally disregard and violate these principles. Thus Section 2, as amended by the 1934 Act, seeks to abolish the doctrine of the *Adair* and *Coppage* cases. This Section states it to be one of the purposes of the Act:

> "(2) to forbid * * * *any denial, as a condition of employment* or otherwise, of the right of employees to join a labor organization;"

Section 2, Fourth, and Section 2, Fifth, then attempt to carry out this purpose by expressly prohibiting the very contracts the right to make which this Court held in the *Adair* and *Coppage* cases to be guaranteed by the Constitution. Section 2, Eighth, undertakes by its express terms to make a contract between the employer and the employee and to impose on the employer by this forced contract an obligation to handle all disputes in accordance with the requirements of the Act. Each of these provisions is backed by the drastic penalties provided in Section 2, Tenth.

These compulsory provisions, together with the provision of Section 2, Ninth, as construed by the courts below, compel the petitioner to recognize a labor union as a factor in the conduct of its business, and deny to it its inherent right to deal directly or through other representatives with such of its employees as desire so to deal. These compulsory provisions must be distinguished from the rules adopted by the Labor Board under Title III of the Transportation Act, 1920, which were upheld in *Pennsylvania R. Co. v. United States Railroad Labor Board*, 261 U. S. 72 (1923), against similar objections, on the express ground that they were without binding force. This Court (at page 85) in that case thus answered the railway's contention that the rules violated the principles of the *Adair* and *Coppage* cases:

> "The statute does not require the railway company to recognize or to *deal with or confer with labor unions*. It does not require employees to deal with their employers through their fellow employees. But we think it does vest the Labor Board with power to decide how such representatives *ought* to be chosen, with a view to securing a satisfactory co-operation, and leaves it to the two sides to accept or reject the decision. * * *
>
> "All that we may do in this case is to hold, as we do, that they [the rules] were within the lawful function of the board to render, and, *not being compulsory*, violate no legal or equitable right of the complaining company."

The carrier's liberty is further impaired by the new provisions of Section 3, as re-enacted by the 1934 Act. This section creates the National Railroad Adjustment Board, and the labor members of the Board are selected (Section 3, First, (a)) by "labor organizations of the employees, national in scope, * * *." Disputes of certain enumerated kinds between a carrier and its employees may, under Section 3, First, (i), be referred to this Board by either party without the consent of the other and without any

previous agreement to arbitrate such disputes. By Section 3, First, (m), the awards of the Board are made "final and binding upon both parties to the dispute, except insofar as they shall contain a money award." Thus, if the carrier may be legally compelled to treat with the representative certified by the Mediation Board under Section 2, Ninth, it may be compelled by Section 3 to arbitrate any disputes of the enumerated classes which arise in the course of the treating; for example, disputes growing out of grievances which may exist in the absence of a contract between the parties. Compulsory arbitration resulting in a binding award has never been held by this Court to constitute due process of law.

If the 1934 amendments which attempt to impose the compulsory features pointed out are upheld, the *Adair* and *Coppage* cases must obviously be overruled.

The courts below have erroneously assumed that the constitutional validity of the Act insofar as the Fifth Amendment is concerned was established by the case of *Texas & N. O. R. Co. v. Brotherhood of Ry. & S. S. Clerks,* 281 U. S. 548 (1930). But that decision involved only Section 2, Third, of the 1926 Act, which was as follows:

> "Third. Representatives, for the purposes of this Act, shall be designated by the respective parties in such manner as may be provided in their corporate organization or unincorporated association, or by other means of collective action, without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other."

The opinion in the *Texas* case, after quoting the above provision, says (at page 558):

> "The controversy is with respect to the construction, validity and application of this statutory provision."

None of the above mentioned provisions of the 1934 amendments, or any similar compulsory provisions, were in the 1926 Act and accordingly no such provisions were before this Court or passed upon in the *Texas* case.

(b) Furthermore, the District Court by enjoining the petitioner from entering into any contract, undertaking or agreement concerning rules, rates of pay or working conditions affecting its mechanical department employees except with the Federation (R. 283), and the Circuit Court of Appeals, by affirming the decree, have construed Section 2 of the Railway Labor Act as forbidding a carrier to enter into any contract, undertaking or agreement concerning rules, rates of pay or working conditions except with the representative chosen by the majority of the employees. Thus the carrier is deprived of the right to bargain or contract with those of its employees who do not desire such representation; and this is so whether the carrier desires to contract directly with an individual in the minority or indirectly through an organization by which the minority desires to be represented. By empowering the majority to speak for the minority, Section 2 as thus construed, in effect delegates to the majority the right to prevent the carrier from making a contract with the minority which the minority is willing to make. A somewhat similar delegation to the majority of power to bind the minority was recently condemned by this Court in *Carter v. Carter Coal Company*, 298 U. S. (decided May 18, 1936), as "legislative delegation in its most obnoxious form" and an "intolerable and unconstitutional interference with personal liberty and private property" in derogation of the due process clause of the Fifth Amendment.

Under the cases hereinabove cited, the decision of the Circuit Court of Appeals on these questions, it is submitted, cannot be sustained. The questions are important questions of federal constitutional law which have not

been, but should in the national public interest be, settled by this Court.

3. In failing to hold that the Railway Labor Act is unconstitutional in its entirety in that it attempts to regulate labor relations between carriers and their back-shop employees engaged solely in activities which are intrastate in character and do not directly affect or burden interstate commerce, the Circuit Court of Appeals has decided important questions of federal law in a way in conflict with applicable decisions of this Court and of other circuit courts of appeals, as will appear below.

(a) The Railway Labor Act in terms applies to back-shop employees. This is clear from the definitions of the term "employee" in Section 1, Fifth, of the Act and in the Interstate Commerce Commission's *Rules Governing the Classification of Steam Railway Employees and Reports of their Service and Compensation, infra,* Appendix p. 43. It is also to be observed that no distinction is attempted to be drawn between activities of employees which do and those which do not directly affect or burden interstate commerce. It is clear from the evidence that the back-shop employees are engaged solely in intrastate activities, and this was the conclusion reached by the District Court (R. 270) and adopted by the Circuit Court of Appeals (R. 313).

It is the position of the petitioner that such back-shop work is not so related to the interstate activities of the petitioner as to admit of federal regulation of the employer-employee relationships of such back-shop employees. This question, as far as the petitioner has been able to discover, has not been directly decided by this Court. There are, however, authorities which sup-

port the position of the petitioner. In the first *Employers' Liability Cases*, 207 U. S. 463, 498 (1908), it was pointed out that although a carrier may be engaged in interstate commerce, it may also transact business which is not interstate in character and which does not directly affect or burden interstate commerce. In that case this Court gave, as an example of the latter, work of the type performed by the petitioner's back-shop employees. Although not controlling on the question at issue, *New York, New Haven and Hartford Railroad Co. v. Bezue*, 284 U. S. 415 (1932), is also indicative of this Court's attitude toward the problem. In the last mentioned case this Court held that work upon a locomotive out of service for repairs taking twelve days was not within the Act.

The courts below were of the opinion that back-shop employees are subject to federal regulation because in the event of a strike by such workers the interstate activities of the petitioner may be interfered with. There are at least two conclusive reasons why this test is entirely inadequate and untenable:

(i) It is untenable for the obvious reason that it does not possess the necessary characteristic of a standard. The strike standard fails utterly as a dividing line because, by such standard, all activities, no matter how local in character, would be held to directly burden or affect interstate commerce inasmuch as such activities when interrupted by strikes to some extent affect the stream of interstate commerce. The back-shop work is just as local as similar work done by concerns such as the Baldwin Locomotive Works and the Virginia Bridge and Iron Works. It is clear under *Carter v. Carter Coal Company*, 298 U. S. (decided May 18, 1936), that employer-employee relations in the case of these two concerns could not be subjected to federal regulation on the ground that a strike or labor dis-

turbance therein might interfere with interstate commerce. As was stated in the *Carter* case, the relation of such employers and employees is a local relation, and strikes of such employees are a local evil over which the federal government has no legislative control, and such effect as they may have upon commerce, however extensive it may be, is secondary and indirect. The mere fact that the petitioner has chosen to perform such back shop work itself does not render such work subject to federal regulation. The Circuit Court of Appeals has failed to give proper consideration to the fact that the petitioner, in engaging in the back shop work, is engaged in purely local activities that are as separate and apart from its transportation business as manufacturing or mining. In this respect the court's decision conflicts with the decision in the *Carter* case and also with *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 83 F. (2d) 998 (C. C. A. 5th, 1936) and *Fruehauf Trailer Company v. National Labor Relations Board*, ___ F. (2d) ___ (C. C. A. 6th, decided June 30, 1936).

(ii) The strike test is also untenable because a strike of the back shop employees resulting in a total shut down of the back shop would not directly interfere with the interstate operations of the petitioner. It is manifest from the testimony that the petitioner could permanently close the Princeton shop tomorrow without occasioning any interruption to its interstate service. As the testimony shows, the back shop employees have no connection with equipment in service. As the testimony also shows, all the work done in the back shop could be handled by outside shops such as those of the Baldwin Locomotive Works and the Virginia Bridge & Iron Works, and the manufactured products made at Princeton could be purchased in the market.

The Circuit Court of Appeals seeks to fill a gap which would otherwise exist in its reasoning by saying (R. 330) that "if labor disturbances of employees such as those who are involved here, warrant the exercise of injunctive power to prevent interference with interstate commerce, as was asserted by the defendant here in the shopmen's strike of 1922 and as was held in *United States v. Railway Employees' Department*, 283 Fed. 479 and 290 Fed. 978, certainly Congress can take appropriate steps to prevent such interference in advance of the disturbance". But in the case of the petitioners only one third of the shopmen are back shop employees and an examination of the opinions cited fails to disclose any basis for a statement that a strike of back shop employees did or would directly interfere with interstate commerce. Direct interference with interstate commerce from a shopmen's strike is due, not to the back shop employees, but to the shopmen employed in making running repairs.

(b) The Railway Labor Act applies in terms to all employees of interstate carriers, irrespective of the fact that some employees may be engaged solely in intrastate activities which do not affect or burden interstate commerce (*supra*, p. 20). It is an unqualified rule that when in the attempted exercise of duly delegated federal power an act attempts to regulate activities both within and outside the scope of federal power, without distinction between the two, it is wholly void. Under the decisions of this Court, if this situation exists, the Court declares the act void as an entirety. It deems itself without power merely to hold it invalid in its application to intrastate activities. *United States v. Reese*, 92 U. S. 214, 221 (1876); *Trade-Mark Cases*, 100 U. S. 82, 96-97 (1879); *James v. Bowman*, 190 U. S. 127, 140 (1903); *Illinois Central Railroad Co. v. McKendree*, 203

U. S. 514, 528-529 (1906); first *Employers' Liability Cases*, 207 U. S. 463 (1908). Nor does the separability provision (Section 8 of the 1934 Act) save the Act or any part of it. It is well settled that when a court can make an act constitutional by striking out words or phrases it may do so, but it is also well settled that a court will not add words of limitation in order to make an invalid act valid, even when the act contains a separability provision. *Hill v. Wallace*, 259 U. S. 44, 70-71 (1922). This doctrine was recently affirmed in *Railroad Retirement Board v. Alton R. Co.*, 295 U. S. 330, 361 (1935). The holding of the Circuit Court of Appeals that the Act could be saved by construction or by the separability provision was accordingly erroneous.

4. In holding that Section 2, Fourth, of the Railway Labor Act which provides that "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act", does not require, in the case of an election to determine who shall be the representative of a craft or class, that the representative receive the votes of a majority of all the eligible members of such craft or class; and in holding that a majority of those voting is sufficient to elect where a majority of those qualified to vote participates in the election, the Circuit Court of Appeals has, it is submitted, misinterpreted the statute. The petitioner believes that it requires the representative to receive the votes of a majority of all the eligible members of such craft or class; otherwise less than a majority (even as low as twenty-six per cent) will have the right to choose the representative and thus control the terms of agreements concerning rates of pay, rules and

working conditions of all the members of the craft or class. It was the manifest purpose of Congress to provide a plan to eliminate as far as possible continual disagreements between carriers and employees and among the employees themselves. This purpose would be thwarted if a minority of a craft or class were permitted to determine such matters, because where less than a majority approves a designated representative there is a tendency for the losing party to seek another election and the issue may not be regarded as definitely settled until a majority of the eligible employees agree upon their choice. Moreover the interpretation of the Circuit Court of Appeals is contrary to the administrative interpretation adopted by the National Mediation Board prior to the decision of the District Court in this case. Since then the Board has adopted a construction similar to that of the District Court and Circuit Court of Appeals herein. See *The Association of Clerical Employees of the A. T. & S. F. Railway System v. Brotherhood of Railway and Steamship Clerks, etc.*, F. (2d) (C. C. A. 7th, decided July 8, 1936), in which this question was also involved. The question is of great importance in the administration of the Act and has not been, but should in the national public interest and for the guidance of the National Mediation Board be, settled by this Court.

5. In failing to decide that the certification of September 13, 1934, of the National Mediation Board under Section 2, Ninth, of the Railway Labor Act is a nullity because it does not contain a finding that a majority of any craft or class of employees voted in favor of the Federation, or even that such a majority participated in the election, and therefore that such certification could not properly be the basis for the injunctive relief granted against the petitioner, the Circuit

Court of Appeals has held valid a certification which does not contain sufficient findings of fact to meet the requirements declared by this Court to be essential in such a case. *Panama Refining Co. v. Ryan*, 293 U. S. 388 (1935), *United States v. Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499 (1935), and *Atchison, T. & S. F. R. Co. v. United States*, 295 U. S. 193 (1935). The certification in question constitutes the very foundation of the cause of action herein. As was said by this Court in the *Panama* case (at page 432),

> "If the citizen is to be punished for the crime of violating a legislative order of an executive officer, or of a board or commission, due process of law requires that it shall appear that the order is within the authority of the officer, board or commission, and, if that authority depends on determinations of fact, those determinations must be shown."

Moreover, the certification shows on its face that the election was conducted under an unlawful rule which contravenes Section 2, Fourth, by providing that each organization receiving a *majority of the legal votes cast* would be recognized as representative of the employees in question, thus permitting a choice to be made by less than a majority of any craft or class.

6. In failing to hold that said certification of the National Mediation Board is a nullity because it improperly includes votes of back-shop employees, engaged solely in intrastate activities not directly affecting or burdening interstate commerce and therefore not subject to federal regulation (*supra*, pp. 20-24), it being impossible to tell what the result of the election would have been if these votes had not been counted, the Circuit Court of Appeals has decided a federal question in a way which the petitioner believes to be in conflict

with applicable decisions of this Court, including *Panama Refining Co. v. Ryan, supra,* and *Atchison T. & S. F. R. Co. v. United States, supra,* and the cases cited, *supra,* pp. 20-24. Under these decisions, it is respectfully submitted, the inclusion of the votes of these back-shop employees in the certification, especially when there is no way of segregating them and determining what the result of the election would have been if only the votes of employees subject to federal regulation had been counted, renders the certification void if it is not void for any other reason.

7. The injunction awarded by paragraph 2 of the decree of the District Court is bottomed on the bulletin of January 20, 1934 (*supra,* p. 6), and the Sasser statement (*supra,* p. 6), both issued by the petitioner, and on acts of employees in respect of which there is no proof whatsoever of participation, authorization or ratification by the petitioner. (The other bulletin was issued in 1922, *supra,* p. 5, and the assistance in "smoothing out" the constitution of the Association was given in the same year, or long before the enactment of the Railway Labor Act, May 20, 1926. There is no contention that any of the financial assistance formerly given to the Association was continued after it became unlawful to give it, *supra,* p. 6. There is no evidence or finding of threats). It is submitted that the bulletin of January 20, 1934, and the Sasser statement were proper communications from employer to employees, not constituting forbidden attempts to "influence" such employees, as the word "influence" is used in Section 2, Third, of the Railway Labor Act of May 20, 1926, and in Section 2, Third and Fourth, of the Railway Labor Act, as amended (*Texas & N. O. R. Co. v. Brotherhood of Ry. & S. S. Clerks,* 281 U. S. 548, 568 (1930), construing the word "influence" in Section 2, Third, of the Railway Labor Act of May 20, 1926).

Section 1 of the Norris-LaGuardia Act specifically provides that "no court of the United States * * * shall have jurisdiction to issue any * * * injunction in a case involving or growing out of a labor dispute, *except in a strict conformity with the provisions of this Act*"; Section 6 provides that no "association or organization participating or interested in a labor dispute, shall be held responsible or liable * * * for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof"; and Section 7 (a) prohibits the issuance of an injunction on account of a threat or unlawful act, except against a person, association or organization making or committing, or authorizing or ratifying, such threat or act. Therefore the acts of employees aforesaid could not legally be made the basis of an injunction against the petitioner.

Moreover, even if the bulletin of January 20, 1934, or the Sasser statement was unlawful under the Railway Labor Act, neither of them could legally be made the basis of an injunction against the petitioner. Section 4 (e) of the Norris-LaGuardia Act provides that no court of the United States shall have jurisdiction to issue an injunction in a case involving or growing out of a labor dispute to prohibit any person participating or interested in such dispute from "Giving publicity to the existence of, or the facts involved in, any labor dispute" by a method not involving fraud or violence. All the bulletin and the statement did was to give publicity to the existence of, and the facts involved in, a labor dispute, and an injunction bottomed thereon is tantamount to an injunction against giving in the future publicity to similar facts to the extent that they come within the wording of the decree. The decree in this case makes no attempt to

exclude from its scope the giving of publicity which may not be enjoined. As an example, the petitioner is enjoined, without qualification, from "discouraging its mechanical department employees from becoming or remaining members of the" Federation. Thus no publicity may be given to any facts about the Federation which would have that effect, such as the facts set forth in the Sasser statement. (The Norris-LaGuardia Act was approved March 23, 1932; the *Texas* case, *supra*, was decided May 26, 1930. Hence the decision in that case has no bearing upon the validity of this point.)

It is submitted that the injunction awarded by paragraph 2 of the decree of the District Court contravenes the plain prohibitions of the above mentioned provisions of the Norris-LaGuardia Act and that the error of the Circuit Court of Appeals in affirming the decree accordingly merits review by this Court.

8. Section 9 of the Norris-LaGuardia Act provides in part as follows:

> "* * * every restraining order or injunction granted in a case involving or growing out of a labor dispute *shall include only a prohibition* of such specific act or acts as may be expressly complained of in the bill of complaint * * *."

The mandatory injunction to treat awarded by paragraph 1 of the decree is not "only a prohibition" and therefore clearly contravenes Section 9. The Circuit Court of Appeals decided, however, that Section 9 does not forbid the granting of a mandatory injunction. The question is obviously one of extreme importance in the application of the Norris-LaGuardia Act, which has not been, but should in the national public interest be, settled by this Court.

It is therefore respectfully submitted that, because of the importance and novelty of the questions presented, the writ of certiorari should be granted.

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August 31, 1936.

APPENDIX

EXCERPTS FROM 1934 AMENDMENTS TO THE RAILWAY LABOR ACT

Act of June 21, 1934, Chap. 691, 48 Stat. 1185.

AN ACT

To amend the Railway Labor Act approved May 20, 1926, and to provide for the prompt disposition of disputes between carriers and their employees.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 1 of the Railway Labor Act is amended to read as follows:

"DEFINITIONS

"Section 1. When used in this Act and for the purposes of this Act—

"First. The term 'carrier' includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, * * *.

"Second. The term 'Adjustment Board' means the National Railroad Adjustment Board created by this Act.

"Third. The term 'Mediation Board' means the National Mediation Board created by this Act.

"Fourth. The term 'commerce' means commerce among the several States or between any State, Territory, or the District of Columbia and any foreign nation, or between any Territory or the District of Columbia and any State, or between any Territory and any other Territory, or between any Territory and the District of Columbia, or within any Territory or the District of Columbia, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign nation.

"Fifth. The term 'employee' as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is hereby conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however,* That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this Act or by the orders of the Commission.

"Sixth. The term 'representative' means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them.

(USC Title 45, §151.)

* * * * *

Sec. 2. Section 2 of the Railway Labor Act is amended to read as follows:

"GENERAL PURPOSES

"Sec. 2. The purposes of the Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to

provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions. (USC Title 45, §151a.)

"GENERAL DUTIES

"First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

"Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

"Third. Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

"Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny

or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

"Fifth. No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this Act, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

"Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided*, (1) That the place so specified shall be situated upon the line of the carrier in-

volved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further,* That nothing in this Act shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

"Seventh. No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

"Eighth. Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this Act, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

"Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a

secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

"Tenth. The willful failure or refusal of any carrier, its officers or agents to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000 nor more than $20,000 or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any district attorney of the United States to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: *Provided*, That nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal

act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent." (USC Title 45, § 152.)

Sec. 3. Section 3 of the Railway Labor Act is amended to read as follows:

"NATIONAL BOARD OF ADJUSTMENT—GRIEVANCES — INTERPRETATION OF AGREEMENTS

"Sec. 3. First. There is hereby established a Board, to be known as the 'National Railroad Adjustment Board', the members of which shall be selected within thirty days after approval of this Act, and it is hereby provided—

"(a) That the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 2 of this Act.

* * * * *

"(c) The national labor organizations, as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one representative on any division of the Board.

* * * * *

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer

of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

* * * * *

"(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

"(n) A majority vote of all members of the division of the Adjustment Board shall be competent to make an award with respect to any dispute submitted to it.

"(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named.

"(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein

stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

* * * * *

(USC Title 45, §153.)

Sec. 6. Section 6 of the Railway Labor Act is amended to read as follows:

"Sec. 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

(USC Title 45, §156.)

Sec. 8. If any section, subsection, sentence, clause, or phrase of this Act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this Act. All Acts or parts of Acts inconsistent with the provisions of this Act are hereby repealed.*

(USC Title 45, §161.)

EXCERPTS FROM
THE NORRIS-LAGUARDIA ACT

Act of March 23, 1932, Chap. 90, 47 Stat. 70.

AN ACT

To amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this Act; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act. (USC Title 29, §101.)

Sec. 4. No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or per-

*The following is Section 11 of the Railway Labor Act as enacted May 20, 1926 (44 Stat. 587):

> "If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act, and the application of such provision to other persons or circumstances, shall not be affected thereby."

The foregoing is the separability provision quoted by the Circuit Court of Appeals (R. 332). The Code of the Laws of the United States of America, 1934 edition, treats this provision as superseded by Section 8 of the 1934 Act.

sons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

* * * * *

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

* * * * *

(USC Title 29, §104.)

Sec. 6. No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof. (USC Title 29, §106.)

Sec. 7. No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

* * * * *

(USC Title 29, §107.)

Sec. 9. No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided herein. (USC Title 29, §109.)

Sec. 13. When used in this Act, and for the purposes of this Act—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or association of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as hereinafter defined) of "persons participating or interested" therein (as hereinafter defined).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

* * * * *

(USC Title 29, §113.)

EXCERPT FROM THE INTERSTATE COMMERCE COMMISSION'S "RULES GOVERNING THE CLASSIFICATION OF STEAM RAILWAY EMPLOYEES AND REPORTS OF THEIR SERVICE AND COMPENSATION, EFFECTIVE ON JULY 1, 1921."

Definition of Employees.—The word employees, as used herein, is intended to include every person in the service of the reporting carrier subject to its continuing authority to supervise and direct the manner of rendition of his service. Persons engaged to render only specifically defined service and not subject to the continuing authority of the carrier to supervise and control their acts, such as customhouse brokers, lawyers retained only for specific cases and not under general or continuing retainer, etc., are not employees in the meaning of the term used herein.

(Washington, Government Printing Office, 1921, page 7.)

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Supreme Court of the United States

OCTOBER TERM, 1936.

No. 324.

THE VIRGINIAN RAILWAY COMPANY,
Petitioner,

vs.

SYSTEM FEDERATION NO. 40, RAILWAY EMPLOYEES DEPARTMENT OF THE AMERICAN FEDERATION OF LABOR, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF ON BEHALF OF PETITIONER.

JAMES PIPER,
H. T. HALL,
W. H. T. LOYALL,
JOHN C. DONNALLY,
Counsel for Petitioner.

The Daily Record Co. Print, Baltimore.

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Supreme Court of the United States

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THE VIRGINIAN RAILWAY COMPANY,
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vs.

SYSTEM FEDERATION NO. 40, RAILWAY EMPLOYEES DEPARTMENT OF THE AMERICAN FEDERATION OF LABOR, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF ON BEHALF OF PETITIONER.

System Federation No. 40, the principal respondent herein, is a federation composed of system craft organizations existing among the shop craft employees of the mechanical department of the petitioner, The Virginian Railway Company. This suit was brought by the respondents to compel the Railway to recognize and "treat with" (in the sense of "negotiate with") the Federation as the representative of its mechanical department employees and (among other things) to enjoin it

from attempting to influence or interfere with such employees thereafter in their choice of representatives for the purpose of collective bargaining. The relief requested was granted by the District Court and on appeal its decree was affirmed by the Circuit Court of Appeals. The case is in this Court on certiorari.

OPINIONS BELOW.

The opinion of the District Court of the United States for the Eastern District of Virginia (R. 254-279) is reported in 11 F. Supp. 621. The opinion of the United States Circuit Court of Appeals for the Fourth Circuit (R. 311-339) is reported in 84 F. (2d) 641.

JURISDICTION.

The decree of the United States Circuit Court of Appeals for the Fourth Circuit (R. 340) was entered on June 18, 1936. The petition for a writ of certiorari was filed August 31, 1936, and was granted October 12, 1936 (R. 342). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

I. Whether Section 2, Ninth, of the Railway Labor Act, which provides that a carrier shall treat with the representative of a craft or class certified by the Mediation Board as the representative of such craft or class (in this case the Federation), imposes a legally enforceable obligation upon the carrier to negotiate with the representative so certified.

II. Whether, if Section 2, Ninth, of the Railway Labor Act requires the Railway to negotiate with the Federa-

tion, it is unconstitutional in that it deprives the Railway of its liberty and property in violation of the due process clause of the Fifth Amendment of the Constitution of the United States.

III. Whether the Railway Labor Act is unconstitutional in its entirety in that it attempts to regulate labor relations between carriers and employees engaged solely in activities intrastate in character which do not directly affect or burden interstate commerce.

IV. Whether the certification of the Mediation Board is a nullity (a) because it fails to show that a majority of any craft or class of employees voted in favor of the Federation, or even that such a majority participated in the election, or (b) because it is impossible to tell from it what the result of the election would have been without the votes of the back-shop employees.

V. Whether an injunction bottomed on publicity given by the Railway to the existence of, and the facts involved in, a labor dispute and on acts of employees not participated in, ratified or authorized by the Railway should have been awarded, particularly in view of the provisions of Sections 4 (e), 6 and 7 (a) of the Norris-LaGuardia Act.

VI. Whether Section 9 of the Norris-LaGuardia Act prohibits the granting by a court of the United States of a mandatory injunction in a case involving or growing out of a labor dispute.

STATUTES INVOLVED.

The statutes involved will be found in the Appendix, *infra*, pp. 67-77.

STATEMENT.

The mechanical department employees of the Railway comprise six shop crafts (R. 31, 244). These shop crafts are divided between (1) so-called "back-shop" employees, whose work consists solely of "classified repairs" and "store order work" (with the exception of one man who makes "running repairs" on a switch engine maintained at Princeton, West Virginia, where the back shop is located and all the back-shop employees work) and (2) employees engaged in making "running repairs". "Classified repairs" are heavy repairs made to locomotives and cars, such as rebuilding and putting them in shape for months of service. For the purpose of classified repairs the locomotives and cars are withdrawn from service for an average of approximately 105 days in the case of locomotives and for an average of approximately 109 days in the case of cars. The Railway has had like work on the locomotives done by the Baldwin Locomotive Works, and the Virginia Bridge and Iron Works has rebuilt a great many of its cars. "Store order work" consists of manufacturing material (such as rivets and repair parts) to be placed in stores at different points on the railroad. If the Railway can make these articles more cheaply than it can buy them they are made at its back shop; otherwise they are bought on the market. (R. 177-180). "Running repairs" are repairs to equipment other than classified repairs. Approximately one-third of the mechanical department employees are back-shop employees. (R. 177, 196).

On July 3, 1922, the United States Railroad Labor Board adopted a resolution calling upon the employees of carriers generally to organize into associations to function in the representation of such employees in disputes involving rules, wages and grievances. The Railway

received an official copy of the resolution (R. 133) and gave information in regard to it to its employees by bulletins posted at various places along the road (R. 145). (The record does not disclose the form or contents of these bulletins.) Subsequently the mechanical department employees of the Railway formed such an association (R. 134), which is hereinafter referred to as the Association, and adopted a written constitution effective October 1, 1922 (R. 224). Beyond posting the bulletins aforesaid and assisting in "smoothing out" the constitution framed by the employees, the Railway had nothing to do with the organization of the Association (R. 144, 145, 180). The Association and the Railway then negotiated and executed a contract covering rules, wages and grievances, effective November 15, 1922, and to continue in effect for one year and thereafter until changed as therein provided (R. 244). The contract has not been terminated (R. 142).

The Railway assisted the Association to function by furnishing meeting places (R. 104), transmitting its notices to members through the company mail (R. 104, 112), paying travelling expenses (R. 115) in an amount averaging approximately $100 a year (R. 145) and possibly furnishing printed ballots for the elections (R. 81, 111). It is not contended that the Railway continued any such financial assistance after it became unlawful for it to give it. The Railway did not interfere in any way with the selection of officers of the Association (R. 110, 111, 120, 142, 167) or with its policies (R. 134, 167).

In the fall of 1933 the American Federation of Labor instituted an intensive campaign for membership among the mechanical department employees of the Railway (R. 76-77). While this was going on the Railway posted

bulletins, dated January 20, 1934, at points that had bulletin boards, the substance of which was that the reports being circulated that the law or the Federal Coordinator of Transportation had outlawed company unions (such as the Association) were unfounded (R. 180-181, 195-196). Other railroads issued similar statements (R. 181). These bulletins were identical with the notices which the Eastern Regional Coordination Committee decided to recommend to the Eastern Presidents' Conference for posting for the information of employees (R. 187-189).

In the spring and summer of 1934 the Federation made various attempts to supplant the Association as representative of the mechanical department employees (R. 233, 234, 235, 239). Under date of July 11, 1934, while these attempts were continuing, the Railway distributed to its employees in pamphlet form, a statement (known in the case as the Sasser statement) purporting to be "a plain statement of the facts in connection with the proposed change" from "Company Employee Representation to National Organization Representation". It asked the employees to give due consideration to these facts, adding, however, that the employees were "entirely free to exercise their choice of representatives, free from fear or favor from their employer" (R. 197).

On August 20, 1934, and subsequent days an election was held on the railroad, conducted by a representative of the National Mediation Board, to determine for each of the six shop crafts whether the employees therein, including the back-shop employees, desired representation by the Federation or by the Association (R. 31, 88). Under date of September 13, 1934, the Mediation Board issued a certification reciting the votes by crafts for the two unions and

on the basis thereof certifying that the Federation had "been duly designated and authorized to represent the mechanical department employees of The Virginian Railway Company" (R. 13). The certification does not show the number of eligible voters or otherwise indicate whether or not in any craft the Federation was the choice of the majority or even whether the majority voted in the election. The number of eligible voters was stipulated at the trial. From this stipulation it appears that in two of the crafts, namely the blacksmiths and the carmen and coach cleaners, a majority did not vote for the Federation and in one of them, namely the carmen and coach cleaners, less than a majority voted in the election (R. 196). Furthermore, it is impossible to tell from the certification what the result of the election would have been in any craft without the votes of the back-shop employees.

In the fall of 1934 a union known as the Independent Shop Crafts Association (hereinafter called the Independent) was formed (R. 167-169). It was not organized by the Railway and the Railway did not function with it (R. 148-149).

There is evidence that Nevins, the Railway's master mechanic at Victoria, had a conversation with an employee under him in which he persuaded the employee not to vote for the Federation (R. 108-109), and, after the election, that Forbes, car foreman at Elmore, obtained from several employees petitions repudiating the Federation and that two workmen on the job circulated several applications for membership in the Independent during working hours (R. 116-120, 122-124), one of them saying he thought it would be best to sign up because the Railway was not going to recognize the Federation (R. 117).

At a conference on December 27, 1934, the Federation presented to the Railway for consideration a draft of agreement transferring to the Federation the existing agreement with the Association, with clauses extending its scope to include employees not members of the mechanical department (R. 61, 74, 78). No subsequent conference was held (R. 79).

On May 2, 1935, the respondents instituted suit in the District Court of the United States for the Eastern District of Virginia asking that the Railway be required to recognize and treat with the Federation as the representative of the mechanical department employees and (among other things) be enjoined from attempting to influence or interfere with said employees thereafter in their choice of representatives for the purpose of collective bargaining (R. 2). On May 20, 1935, the Railway filed a motion to dismiss (R. 37) and an answer (R. 39). After hearing, the District Court on July 24, 1935, filed an opinion (R. 254) holding that the Railway should be required to recognize and treat with the Federation as the representative of the five crafts in which a majority of the eligible voters had participated in the election, that is to say, all the crafts except the carmen and coach cleaners, and also should be enjoined from interfering with the respondents and the members of the crafts involved in the matter of self organization.

On August 23, 1935, the District Court entered a final decree (R. 279), overruling the motion to dismiss, making findings of fact and granting relief. The court found (R. 280-281) that the Federation was the duly authorized representative of the Railway's mechanical department employees, except the carmen and coach

cleaners, "having been designated as such" by the certification aforesaid, and that the Railway, in violation of Section 2 of the Railway Labor Act, had failed to treat with it as such. The court further found (R. 281-282) that "by means of personal interviews, posted bulletins and by the circulation of a pamphlet [the Sasser statement] calling the attention of its mechanical department employees to the disadvantages attendant upon membership in a standard labor organization and the advantages of a company union, the defendant [Railway] sought to influence its mechanical department employees against any participation in or association with a standard labor organization and thereby to maintain a mere nominal association or union supported wholly by the defendant, and in the further effort to prevent its mechanical department employees from exercising their free and untrammelled right to choose their own representative"; that the Railway, by and through its officers, agents and servants, undertook by means of the circulation of a petition or petitions addressed to the Mediation Board to have the certification aforesaid altered, changed or revoked, and, by circulating or causing to be circulated applications for membership therein, caused the Independent to be organized, all in violation of the Railway Labor Act; and that it continued and now continues by the means aforesaid to endeavor to deprive its mechanical department employees of any and all right to independent representation, in violation of the Railway Labor Act.

By paragraph 1 of the decree (R. 282) the District Court ordered the Railway to treat with the Federation "so certified as aforesaid, and exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes", and by paragraph 2 of the decree (R.

282-283) it enjoined the Railway from interfering with, influencing or coercing any of its mechanical department employees with respect to their right of selecting or designating representatives; from organizing, promoting, fostering or being in anywise concerned with the organization, fostering, maintenance or encouraging of any association of such employees with the intent or with the purpose of in anywise interfering with the Federation, or any successor representative, in violation of the Railway Labor Act; from preventing or discouraging such employees from becoming or remaining members of the Federation; and from "entering into any contract, undertaking or agreement of whatsoever kind concerning rules, rates of pay or working conditions affecting its mechanical department employees [which include the carmen and coach cleaners], save and except only with the complainant, System Federation No. 40".

There is no evidence that the Railway participated in, authorized or ratified the acts of the master mechanic, car foreman or workmen testified to or any other acts tending to support the findings on which the injunction awarded by paragraph 2 of the decree, insofar as it relates thereto, is based, or even that it had any knowledge of such acts, other than the assistance in "smoothing out" the constitution of the Association in 1922, the posting of the bulletins, the issuance of the Sasser statement, and the financial assistance formerly given to the Association. The uncontradicted testimony is to the contrary (R. 144, 145, 159, 176, 180, 186). There is no evidence or finding of threats.

The Circuit Court of Appeals in an opinion filed June 18, 1936 (R. 311), held that the decree of the District Court should be affirmed and affirmed it by decree entered the same day (R. 340).

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

I. In holding that Section 2, Ninth, of the Railway Labor Act, which provides that a carrier shall treat with the representative of a craft or class certified by the Mediation Board as the representative of such craft or class (in this case the Federation), imposes a legally enforceable obligation upon the carrier to negotiate with the representative so certified.

II. In failing to hold that, if Section 2, Ninth, of the Railway Labor Act requires the Railway to negotiate with the Federation, it is unconstitutional in that it deprives the Railway of its liberty and property in violation of the due process clause of the Fifth Amendment of the Constitution of the United States.

III. In failing to hold that the Railway Labor Act is unconstitutional in its entirety in that it attempts to regulate labor relations between carriers and employees engaged solely in activities intrastate in character which do not directly affect or burden interstate commerce.

IV. In failing to hold that the certification of the Mediation Board is a nullity (a) because it fails to show that a majority of any craft or class of employees voted in favor of the Federation, or even that such a majority participated in the election, and (b) because it is impossible to tell from it what the result of the election would have been without the votes of the back-shop employees.

V. In failing to hold that an injunction bottomed on publicity given by the Railway to the existence of, and the facts involved in, a labor dispute and on acts of em-

ployees not participated in, ratified or authorized by the Railway should not have been awarded, particularly in view of the provisions of Sections 4 (e), 6 and 7 (a) of the Norris-LaGuardia Act.

VI. In holding that Section 9 of the Norris-LaGuardia Act does not prohibit the granting by a court of the United States of a mandatory injunction in a case involving or growing out of a labor dispute.

VII. In affirming the decree of the District Court.

SUMMARY OF ARGUMENT.

I.

Section 2, Ninth, of the Railway Labor Act, which provides that a carrier shall treat with the representative of a craft or class certified by the Mediation Board as the representative of such craft or class, does not impose a legally enforceable obligation upon the carrier to negotiate with the representative so certified. Congress did not use the phrase "treat with" in the sense of "negotiate with", but in its very usual sense of "act towards" or "regard", the meaning urged upon the court below not only by the Railway but by the United States as *Amicus Curiae*. The history of the Railway Labor Act fully supports the conclusion that Section 2, Ninth, was not intended to impose an obligation to negotiate. Moreover, if Section 2, Ninth, imposes a legally enforceable obligation to negotiate, it violates the due process clause of the Fifth Amendment and this is an additional reason for holding that the construction of the Circuit Court of Appeals should be rejected.

Even if Congress, by Section 2, Ninth, intended to impose a legally enforceable obligation upon carriers to

negotiate with representatives certified by the Mediation Board, which the Railway denies, the obligation is an imperfect one, not enforceable in terms; accordingly one beyond the power of courts of equity to enforce.

II.

If Section 2, Ninth, of the Act requires the Railway to negotiate with the Federation, it is unconstitutional in that it violates the due process clause of the Fifth Amendment. Negotiation with respect to the terms of a contract is part of the contractual process and since the employer cannot be compelled to take the ultimate step represented by the agreement of contract, it is plain that he cannot be compelled to take the initial steps looking towards the agreement of contract. As viewed by the Fifth Amendment, the contractual process is a single process, indivisible and entire; all elements of that process, without distinction among them, enjoy the same protection. It is every man's civil right to be left at liberty to refuse, for any reason, business relations with any person whomsoever.

The abridgement of liberty of contract here attempted is arbitrary and unreasonable. The statutory direction to treat, as interpreted by the Circuit Court of Appeals, is utterly futile. Negotiation is entirely a matter of state of mind, a condition in its nature completely beyond legislative or judicial control.

Furthermore, the Circuit Court of Appeals construed the Act as preventing the Railway from contracting with anyone except the Federation. The Railway is thus deprived of the right to bargain or contract with those of its employees who do not desire representation by the Federation. If the Act empowers the majority of any

craft or class of employees to speak for the minority, in effect it delegates to the majority the right to prevent the carrier from making a contract with the minority which the minority may be willing to make, in violation of the due process clause of the Fifth Amendment.

III.

The Railway Labor Act in terms applies to carriers' employees engaged solely in intrastate activities not directly affecting or burdening interstate commerce. The work of the back-shop employees of the Railway is manufacture and, as this Court has long held, manufacture is not commerce. It was held below that the back-shop employees were subject to Federal regulation because a strike by such workers might interfere with the interstate activities of the Railway. The strike standard is entirely inadequate and untenable. It does not possess the necessary characteristic of a standard. By the strike standard, all activities, no matter how local in character, would be held to directly burden or affect interstate commerce inasmuch as any interruption of such activities by strikes would, to some extent, affect the stream of interstate commerce. The strike standard is also untenable because, as a matter of fact, a strike of the back-shop employees resulting in a total shutdown of the back shop would not directly interfere with the interstate operations of the Railway. All the work done in the back shop could be handled by outside shops. Furthermore this Court may take judicial notice of the fact that carriers by railroad subject to the Act have other employees whose activities do not directly affect or burden interstate commerce.

The Act in terms applies to employees of interstate carriers irrespective of the fact that some employees may

be engaged solely in intrastate activities which do not affect or burden interstate commerce. It is well settled that when, in the attempted exercise of duly delegated Federal power, an act purports to regulate activities both within and without the scope of Federal power without distinction between the two, it is wholly void. In this situation the courts are bound to declare the act void as an entirety. They cannot merely hold it invalid in its application to intrastate activities.

IV.

The certification of the Mediation Board fails to show that a majority of any craft or class of employees voted in favor of the Federation, or even that such a majority participated in the election. Section 2, Fourth, requires that, to be elected, such representative receive the votes of a majority of all the eligible members of such craft or class. To hold otherwise means that less than a majority have the right to choose such representative and thus control the terms of agreements concerning rates of pay, rules and working conditions of all members of the craft or class. Such a construction is contrary to the manifest purpose of the Act, and is also contrary to the administrative interpretation adopted by the Mediation Board prior to the decision of the District Court in this case.

The certification does not contain sufficient findings of fact to show compliance with this requirement of Section 2, Fourth, and therefore does not meet the requirements declared by this Court to be essential in such a case; accordingly it is a nullity.

The certification improperly includes in the votes which it reports the votes of back-shop employees en-

gaged solely in intrastate activities not directly affecting or burdening interstate commerce. The certification is therefore a nullity for the additional reason that it is impossible to tell from it, for any craft, what the result of the election would have been if the votes of the backshop employees had not been included.

V.

The injunction bottomed on publicity given by the Railway to the existence of, and the facts involved in, a labor dispute and on acts of employees not participated in, ratified or authorized by the Railway should not have been awarded, particularly in view of the provisions of Sections 4 (e), 6 and 7 (a) of the Norris-LaGuardia Act. Section 4 (e) of the Norris-LaGuardia Act provides that no court of the United States shall have jurisdiction to issue an injunction in a case involving or growing out of a labor dispute to prohibit any person participating or interested in such dispute from "Giving publicity to the existence of, or the facts involved in, any labor dispute" by a method not involving fraud or violence.

All that the bulletins and the Sasser statement did was to give publicity to the existence of, and the facts involved in, a labor dispute, and an injunction bottomed thereon is tantamount to an injunction against giving in the future publicity to similar facts to the extent that they come within the wording of the decree. Under the provisions of Sections 6 and 7 (a) the acts of employees complained of could not legally be made the basis of an injunction against the Railway. With respect to such acts, there is no proof whatsoever of participation therein, or authorization or ratification thereof, by the Railway.

VI.

Section 9 of the Norris-LaGuardia Act provides that every injunction granted in a case involving or growing out of a labor dispute "shall include only a prohibition" of acts complained of in the bill of complaint. The mandatory injunction awarded by paragraph 1 of the decree is not "only a prohibition" and is therefore beyond the powers of a Federal court of equity as restricted by this section.

ARGUMENT.

I. SECTION 2, NINTH, OF THE RAILWAY LABOR ACT, WHICH PROVIDES THAT A CARRIER SHALL TREAT WITH THE REPRESENTATIVE OF A CRAFT OR CLASS CERTIFIED BY THE MEDIATION BOARD AS THE REPRESENTATIVE OF SUCH CRAFT OR CLASS (IN THIS CASE THE FEDERATION), DOES NOT IMPOSE A LEGALLY ENFORCEABLE OBLIGATION UPON THE CARRIER TO NEGOTIATE WITH THE REPRESENTATIVE SO CERTIFIED.

(a) Congress did not intend, by Section 2, Ninth, to impose a legally enforceable obligation to negotiate.

Paragraph 1 of the decree of the District Court (R. 282) awards a mandatory injunction requiring that the Railway "shall treat with" the Federation and "exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of the defendant growing out of any dispute between the defendant and the mechanical department employees thereof". Paragraph 2 of the decree, among other things, enjoins the Railway from "entering into any contract,

undertaking or agreement of whatsoever kind concerning rules, rates of pay or working conditions affecting its mechanical department employees'' except with the Federation (R. 282-283).

The above mentioned portions of the decree are based, it is submitted, upon a misconstruction of Section 2, Ninth, of the Railway Labor Act. This paragraph, which was added to the Railway Labor Act of 1926 by the 1934 Amendments, provides that in case of a dispute among a carrier's employees as to who are their representatives, the carrier ''shall treat with the representative'' certified as such by the Mediation Board ''as the representative of the craft or class'' of employees, involved in the dispute, for the purposes of the Act. The portion of paragraph 1 of the decree which requires the Railway to ''exert every reasonable effort to make and maintain agreements'', etc., follows the exact wording of Section 2, First, of the Railway Labor Act of 1926, which was continued by the 1934 Amendments *without change*. The Circuit Court of Appeals held ''treat with'' in Section 2, Ninth, to mean ''negotiate with'' (R. 320-321) and presumably this portion of paragraph 1 of the decree was upheld as a definition of the negotiations the Railway was required thereby to undertake.

In *Malone v. Gardner*, 62 F. (2d) 15, 18-20 (C. C. A. 4th, 1932), the Circuit Court of Appeals held Section 2, First, of the Railway Labor Act to be a general admonition or declaration of duty, indicating what Congress wished the parties to the dispute to do, but not intended to be a positive obligatory law creating enforceable duties, citing in support of its holding this Court's review of the Railway Labor Act in *Texas & N. O. R. Co. v. Brotherhood of Ry. & Steamship Clerks*, 281 U. S. 548 (1930),

and its construction of the Transportation Act, 1920 (41 Stat. 469), in *Pennsylvania Railroad System v. Pennsylvania R. Co.*, 267 U. S. 203 (1925). In the present case, however, the Circuit Court of Appeals, while citing its decision in *Malone v. Gardner*, *supra*, with apparent approval (R. 319), affirmed a decree awarding a mandatory injunction requiring the Railway to do exactly what it had held in that case was an unenforceable duty. It rested the authority to award such an injunction and its affirmance, not upon any change in Section 2, First (as pointed out above this provision was continued unchanged), not upon any change in its construction (it apparently approves its original construction), but solely upon the addition to the Railway Labor Act of the provision in Section 2, Ninth, that carriers "shall treat with" representatives certified by the Mediation Board as the representatives of their employees for the purposes of the Act (R. 320-321). In other words, it held, in effect, that an admittedly unenforceable duty "to exert every reasonable effort to make and maintain agreements" had been transformed into a legally enforceable one by the mere addition to the statute of a requirement that carriers "shall treat with" representatives certified as aforesaid as the representatives of their employees for the purposes of the Act. To put it another way, the Court seems to have felt that, while a direction to negotiate for specified purposes (Section 2, First), was legally unenforceable, such direction was made legally enforceable by the addition to the statute of (what it construed to be) a direction to "negotiate" for any of the purposes of the Act (Section 2, Ninth).

Even if Congress had the power to do so, it is clear that it did not intend to make any such change in the law, and did not, as the Circuit Court of Appeals thought, use

"treat with" in the sense of "negotiate with", but in its very usual sense* of "act towards" or "regard", the meaning of the phrase urged upon the Court below not only by the Railway but by the United States as *Amicus Curiae.***

First, the duty imposed by Section 2, Ninth, is not "to treat with the representative of the craft or class certified by the Mediation Board" and therefore subject to the construction that Congress intended to impose thereby a duty to negotiate; the duty imposed is to treat with the representative so certified *"as the representative of the craft or class."**** The decree ignores the phrase in italics. If Congress had used "treat with" in the sense of "negotiate with" it would not have included that phrase.

**The Century Dictionary* (1897) gives as the primary meaning of the verb "treat" in its transitive sense, "To behave to or toward", and, among other meanings, "To look upon; consider; regard". The *American Oxford Dictionary* (1931) gives as the primary meaning, "Act or behave towards in specified way". Other dictionaries give similar definitions. The superfluous addition of the word "with", as in Section 2, Ninth, is common in this country; for example, in the phrase "visit with", as to which see Horwill, *Modern American Usage* (1935), p. 341.

**"With respect to this question, the Government wishes merely to point out that requiring a carrier to 'treat with' the selected representatives of the employees does not require the carrier to enter into contracts with them *but only to recognize the persons chosen by the employees as the agents of the employees.* This does not interfere with any property rights of the carrier in such a way as to violate the due process clause, since the carrier has no right to participate in the determination of employee representatives." (*Brief for the United States as Amicus Curiae in Support of the Constitutionality of the Railway Labor Act as here Applied*, page 3, filed in the Circuit Court of Appeals in this case.)

*** It may be assumed that all italics are supplied.

Second, this construction is fully supported by related provisions of the Act and by its history.

Section 2, Second, of the Act provides that "All *disputes* between a carrier or carriers and its or their employees *shall be considered, and, if possible, decided,* with all expedition, *in conference between representatives designated and authorized so to confer,* respectively, by the carrier or carriers and by the employees thereof interested in the dispute." This paragraph was derived from Section 301 of the Transportation Act, 1920, which contained the controlling wording italicized above. In the face of the argument that it would "make the act meaningless and wholly ineffective if under the act the parties may not be forced to a conference", (an argument identical in substance with the reasoning of the Circuit Court of Appeals in this case (R. 317)), this Court held, in *Pennsylvania Railroad System v. Pennsylvania Railroad Company,* 267 U. S. 203, 216-217 (1925), that Section 301 of the Transportation Act, 1920, imposed a legally unenforceable duty. Congress must have intended that Section 2, Second, should likewise be construed as imposing a legally unenforceable duty; otherwise it would not have continued therein the same controlling wording.*

* That this was the intention of Congress is made doubly clear by Section 5, First, which prescribes the procedure to be followed when disputes are not adjusted in conference *"or where conferences are refused."* Either party may invoke the services of the Mediation Board; the Board is to use its best efforts, by mediation, to bring the parties to agreement; and, failing that, is to endeavor "as its final required action" (with exceptions here immaterial) to induce them to submit their controversy to arbitration. At no point is there any suggestion that either party may by legal action force the other to a conference. Section 5, First, in providing for mediation where conferences are refused, assumes the contrary to be the case.

Section 2, Second, which thus imposes a legally unenforceable duty to consider disputes in conference, applies to all carriers, including necessarily carriers whose employees' representatives have been certified by the Mediation Board under Section 2, Ninth, as well as carriers whose employees' representatives have not been so certified.* But under the Circuit Court of Appeals' construction of the phrase "treat with" in Section 2, Ninth, carriers whose employees happen to have had disputes among themselves as to who are their representatives, and in consequence have representatives certified by the Mediation Board, are under a legally enforceable duty to negotiate with the representatives of their employees, while the duty of all other carriers in this regard remains legally unenforceable. It is submitted that Congress could not have intended to make a distinction of that kind. A construction of the Act which brings about such an anomalous result should, if possible, be avoided, and it can be avoided by construing the phrase "treat with" in its very usual sense of "act towards" or "regard". (*Supra*, p. 20).

Furthermore, even if Congress used the phrase "treat with" in Section 2, Ninth, in the sense of "negotiate with", it does not follow that it intended thereby to impose a legally enforceable duty. A requirement that carriers shall negotiate with representatives of employees for the purposes of the Act (Section 2, Ninth, as construed below) is tantamount to a requirement that they shall consider disputes in conference with such representatives (Section 2, Second), particularly in view of the fact that the Act was passed to provide for the "dis-

* The opening sentence of Section 2, Ninth, makes it clear that Section 2, Ninth, has no application except to a case in which a dispute arises among a carrier's employees as to who are the representatives of such employees.

position of disputes". Consequently, if "treat with" means "negotiate with", Section 2, Ninth, should be construed to impose a legally unenforceable obligation similar to the legally unenforceable obligation imposed by Section 2, Second (*Supra*, p. 21).

The history of the Railway Labor Act fully supports the conclusion that Section 2, Ninth, was not intended to impose an obligation to negotiate.

The essential characteristic of the Railway Labor Act of 1926 was that it provided a voluntary scheme for the adjustment of the relations between carriers and their employees. This characteristic was recognized by this Court in *Texas & N. O. R. Co. v. Brotherhood of Ry. & S. S. Clerks*, 281 U. S. 548 (1930), in which the Chief Justice said (p. 569):

> "Freedom of choice in the selection of representatives on each side of the dispute is the essential foundation of the statutory scheme. All the proceedings looking to amicable adjustments and to agreements for arbitration of disputes, the entire policy of the act, must depend for success *on the uncoerced action of each party* through its own representatives to the end that agreements satisfactory to both may be reached and the peace essential to the uninterrupted service of the instrumentalities of interstate commerce may be maintained. There is no impairment [by Section 2, Third, of the Railway Labor Act of 1926] of the voluntary character of arrangements for the adjustment of disputes in the imposition of a legal obligation not to interfere with the free choice of those who are to make such adjustments. On the contrary, it is of the essence of a voluntary scheme, if it is to accomplish its purpose, that this liberty should be safeguarded."

The purpose of Congress in adding Section 2, Ninth, to the Railway Labor Act of 1926 is apparent from the following statement which appears in the report from

the Committee on Interstate and Foreign Commerce of the House of Representatives to accompany H. R. 9861, the bill which enacted the 1934 Amendments to the Railway Labor Act (Report No. 1944, *infra*, Appendix p. 77):

> "6. The Railway Labor Act of 1926, now in effect, provides that representatives of the employees, for the purpose of collective bargaining, shall be selected without interference, influence, or coercion by railway management, *but it does not provide the machinery necessary to determine who are to be such representatives.* These rights of the employees under the present act are denied by railway managements by their disputing the authority of the freely chosen representatives of the employees to represent them. A considerable number of railway managements maintain company unions, under the control of the officers of the carriers, and pay the salary of the employees' representatives, a practice that is clearly contrary to the purpose of the present Railway Labor Act, but it is difficult to prevent it because the act does not carry specific language in respect to that matter. This bill is designed to correct that defect."

It is apparent that Section 2, Ninth, was intended to provide the machinery for determining the representatives of employees in cases of disputes between employees as to who are such representatives, and that it was not intended to do away with the voluntary scheme of the Act. This is also made clear by the statement in the Committee Report that the 1934 Amendments did "*not introduce any new principles into the existing Railway Labor Act*" and did "*not change the methods of conference, mediation, and voluntary arbitration* to settle major disputes over wages and working conditions, which are provided in the Railway Labor Act of 1926."

When read in the light of this background, the meaning of Section 2, Ninth, is unambiguous. The first sentence of Section 2, Ninth, provides that if any dispute shall arise among employees as to who are the representatives of such employees, it shall be the duty of the Mediation Board to investigate such dispute and to certify to both parties and the carrier the names of the individuals or organizations that have been designated to represent the employees. The second sentence then provides that "upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act." The latter sentence means only that if and when the carrier, after such a dispute and certification, desires to deal with a representative of the craft or class involved, it must treat with the person or organization, found by the Mediation Board to be the authorized representative, as the authorized representative, and not with someone else. It does not mean that as a consequence of a dispute and certification (but not otherwise), the carrier is under a legally enforceable obligation to negotiate with a representative of its employees. To so hold is not only to ignore the "voluntary scheme" of the Act which the Chief Justice in the *Texas* case said was its "essence", but to impute to Congress the unlikely intention of creating a duty on the part of a carrier to negotiate with a representative of its employees, enforceable when, but only when, its employees have had a dispute as to who that representative shall be.

It is clear that Congress did not intend, by Section 2, Ninth, of the Act, to impose upon carriers a duty to negotiate with representatives of their employees, but used the phrase "treat with" in the very usual sense of "act towards" or "regard". And even if Congress used the phrase "treat with" in the sense of "negotiate with", it

is obvious that it did not intend thereby to create a legally enforceable obligation to negotiate.

Moreover, as will be shown (*infra,* pp. 29-38), if Section 2, Ninth, imposes a legally enforceable obligation to negotiate, it violates the due process clause of the Fifth Amendment, and this is an additional reason for holding that the construction of the Circuit Court of Appeals in this case is erroneous.

For the reasons aforesaid it is submitted that the mandatory injunction requiring the Railway to negotiate with the Federation should not have been awarded.

(b) A duty to negotiate is an imperfect obligation not enforceable in terms; accordingly it is beyond the power of courts of equity to enforce.

That an affirmative declaration of a duty to negotiate may be of imperfect obligation because not enforceable in terms and accordingly beyond the powers of a court of equity to enforce is recognized by this Court.*

As noted above the Circuit Court of Appeals held (erroneously, it is submitted) that "treat with" in Section 2, Ninth, was used in the sense of "negotiate with" and, based on this view, affirmed a decree granting a mandatory injunction requiring the Railway to negotiate with the Federation. But negotiation depends upon the feel-

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* In *Texas & N. O. R. Co. v. Brotherhood of Ry. & S. S. Clerks,* 281 U. S. 548, 568 (1930), this Court said:

> "While an affirmative declaration of duty contained in a legislative enactment may be of imperfect obligation because not enforceable in terms, a definite statutory prohibition of conduct which would thwart the declared purpose of the legislation cannot be disregarded."

ings, desires and mental attitude of those negotiating, and these are completely beyond judicial control. In order to negotiate in good faith, one must have the desire and the will to negotiate and this implies the existence of a desire to make an agreement upon the best terms possible and to make counter proposals if necessary and do everything else that constitutes bargaining. It is easy to imagine demands, made upon a carrier by its employees, so unreasonable that the carrier could not for an instant consider acceding thereto to any extent whatsoever. May the carrier, nevertheless, negotiate without any good faith intention of acceding to such demands to any extent? The answer must be in the negative—one cannot be said, for example, to negotiate for the purchase of a house if he have a settled determination never to buy a house on any terms.

The following statement of the powers of a court of equity under similar circumstances appears in the opinion of Story, J., in *Tobey v. Bristol,* Fed. Cas. No. 14,065, at p. 1321 (C. C. Mass., 1845):

> "And this leads me to remark in the second place, that it is an established principle of courts of equity never to enforce the specific performance of any agreement, where it would be a vain and imperfect act, or where a specific performance is from the very nature and character of the agreement, impracticable or inequitable, to be enforced. 2 Story, Eq. Jur. § 959a. Thus, for example, courts of equity will not decree the specific performance of an agreement for a partnership in business, where it is to be merely doing the pleasure of both parties, because it may be forthwith dissolved by either party. See Story, Partn. §§ 189, 190, and Colly. Partn. (2d Ed.) bk. 2, pp. 132, 133, c. 2, § 2; 1 Story, Eq. Jur. § 666, and the cases there cited; Crawshay v. Maule, 1 Swanst. 515, the reporter's note. So, upon the like ground, courts of equity will not decree the specific perform-

> ance of a contract by an author to write dramatic performances for a particular theatre, although it will restrain him from writing for another theatre, if he has contracted not to do so (2 Story, Eq. Jur. § 959a; Morris v. Colman, 18 Ves. 437; Clarke v. Price, 3 Wils. Ch. 157; Baldwin v. Society for Diffusion of Useful Knowledge, 9 Sim. 393); nor will they compel the specific performance of a contract by an actor to act a specified number of nights at a particular theatre (Kemble v. Kean, 6 Sim. 333); nor will they compel the specific performance of a contract to furnish maps to be engraved and published by the other party (Baldwin v. Society for Diffusion of Useful Knowledge, 9 Sim. 393). In all these cases the reason is the same, the utter inadequacy of the means of the court to enforce the due performance of such a contract. The same principle would apply to the case of a specific contract by a master to paint an historical picture, or a contract by a sculptor to carve a statue or a group, historical or otherwise. From their very nature, all such contracts must depend for their due execution, upon the skill, and will, and honor of the contracting party."

Not only is the attempted enforcement against the carrier of the provisions of Section 2, Ninth, as construed by the Circuit Court of Appeals, impracticable for the foregoing reasons, but it is a vain and imperfect act because the carrier cannot be compelled to take the ultimate step represented by the agreement of contract.

The following statement of the rule in the analogous case of arbitration appears in *Pomeroy's Equity Jurisprudence*, (4 ed.), at §2180:

> "An agreement to submit a matter to arbitration, or to sell at a price to be fixed by valuers, if the mode of fixing the price is an essential part of the contract, will not be specifically enforced, since it is beyond the power of the court to compel arbitra-

tors to agree; nor will the court itself fix the price, since that would be to make a new agreement for the parties."

It follows that even if Congress, by Section 2, Ninth, of the Railway Labor Act, intended to impose a legally enforceable obligation upon carriers to negotiate with representatives certified by the Mediation Board, which the Railway denies, the obligation is an imperfect one, not enforceable in terms and beyond the powers of courts of equity to enforce. Accordingly the mandatory injunction requiring the Railway to negotiate with the Federation and the injunction restraining it from contracting with anyone else should not have been awarded.

II. IF SECTION 2, NINTH, OF THE RAILWAY LABOR ACT REQUIRES THE RAILWAY TO NEGOTIATE WITH THE FEDERATION, IT IS UNCONSTITUTIONAL IN THAT IT DEPRIVES THE RAILWAY OF ITS LIBERTY AND PROPERTY IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

The Circuit Court of Appeals construed Section 2, Ninth, of the Railway Labor Act as imposing a legally enforceable obligation upon a carrier to negotiate with the representative certified by the Mediation Board and as precluding the carrier from entering into any contract, undertaking or agreement concerning rules, rates of pay or working conditions affecting its employees except with such representative. In accordance with this construction it upheld the mandatory injunction awarded by paragraph 1 of the decree directing the Railway to "treat with" (meaning "negotiate with") the Federation and to "exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes" and also the injunction awarded by paragraph 2 of the decree restrain-

ing the Railway from "entering into any contract, undertaking or agreement of whatsoever kind concerning rules, rates of pay or working conditions affecting its mechanical department employees," except with the Federation (R. 282-283). It is submitted that Section 2, Ninth, of the Act so construed is unconstitutional in that it deprives the Railway of its liberty and property in violation of the due process clause of the Fifth Amendment of the Constitution of the United States.

(a) The mandatory injunction directing the Railway to negotiate with the representative certified by the Mediation Board and exert every reasonable effort to make and maintain agreements and to settle disputes is a violation of the due process clause of the Fifth Amendment.

This Court has long held that the employer-employee relationship, particularly the freedom of employers and employees to deal with each other on equal and voluntary terms, is subject to the protection of the due process clauses of the Fifth and Fourteenth Amendments. *Lochner v. New York,* 198 U. S. 45, 53 (1905); *Adair v. United States,* 208 U. S. 161, 173 (1908); *Hitchman Coal & Coke Co. v. Mitchell,* 245 U. S. 229, 250 (1917); *Morehead v. Tipaldo,* 298 U. S. 587 (1936). It has held further that the liberty to refrain from entering into contracts is a part of liberty of contract, so that legislation which compels the making of agreements is a violation of fundamental rights and is void. *Coppage v. Kansas,* 236 U. S. 1, 20 (1915). Liberty of contract as a right is, of course, not absolute, but qualified. *Nebbia v. New York,* 291 U. S. 502, 523 (1934). But as this Court has stated only recently, "Legislative abridgment of that freedom can only be justified by the existence of exceptional circumstances. Freedom of contract is the general rule and restraint the exception." *Morehead v. Tipaldo, supra.*

It should be observed at the outset that there are no "exceptional circumstances," no imminent "disaster" (*Wilson v. New*, 243 U. S. 332, 342 (1917)), no unusual "danger" (*Holden v. Hardy*, 169 U. S. 366, 393 (1898)), no "desperate" situation (*Nebbia v. New York*, 291 U. S. 502, 515 (1934)) or no element of "deception" (*Hall v. Geiger-Jones Co.*, 242 U. S. 539, 551 (1917)), present in this case which requires the abridgment of basic rights such as is here attempted. The Railway Labor Act is permanent legislation calculated to control relationships of carriers and their employees as a lasting matter. The validity of the Railway Labor Act has been sustained by this Court only as a "voluntary scheme" involving no invasion of contract relationships. *Texas & N. O. R. Co. v. Brotherhood of Ry. & S. S. Clerks*, 281 U. S. 548 (1930). See also *Pennsylvania Railroad Company v. United States Railroad Labor Board*, 261 U. S. 72 (1923); *Pennsylvania Railroad System v. Pennsylvania R. Co.*, 267 U. S. 203 (1925).

As construed by the Circuit Court of Appeals, the Act no longer provides a system for the voluntary adjustment of labor disputes as distinguished from a system of compulsion, which former system, in the *Texas* case, *supra*, was stated to be its "essence." The Circuit Court of Appeals holds that Section 2, Ninth, of the Act establishes a system of compulsion, at least so far as the carrier is concerned. It is significant to note that no similar system of compulsion is imposed thereby upon the employees. They are under no corresponding duty to negotiate with the representatives of the carrier.

That the Act as so construed violates the due process clause of the Fifth Amendment is clear from many decisions of this Court. Negotiation with respect to the

terms of the contract is a part of the contractual process and since the employer cannot be compelled to take the ultimate step represented by the agreement of contract (*Coppage v. Kansas, supra*), it is plain that he cannot be compelled to take the initial steps looking towards the agreement of contract. As viewed by the Fifth Amendment the contractual process is a single process, indivisible and entire; all elements of that process, without distinction among them, enjoy the same protection. In the *Adair* case this Court (at p. 173) quoted with approval the following from *Cooley on Torts:*

> "It is a part of every man's civil rights that he be left at liberty *to refuse business relations* with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice. With his reasons neither the public nor third persons have any legal concern. It is also his right to have *business relations* with anyone with whom he can make contracts, and, if he is wrongfully deprived of this right by others, he is entitled to redress."

The doctrine that liberty of contract includes liberty to refuse to have business relations to any extent has been exemplified in the cases upholding the right of every man to deal with or refuse to deal with, any man, or class of men as he sees fit, whatever his motive, or whatever the resulting injury, without being held in any way accountable therefor (*Federal Trade Commission v. Raymond Brothers-Clark Company*, 263 U. S. 565 (1924); *United States v. Colgate & Company*, 250 U. S. 300 (1919); *Grenada Lumber Co. v. Mississippi*, 217 U. S. 433 (1910); *Great Atlantic and Pacific Tea Company v. Cream of Wheat Co.*, 227 Fed. 46 (C. C. A. 2d., 1915)), and in the cases striking down schemes of compulsory arbitration (*Wolff Packing Co. v. Court of Industrial Relations*, 267

U. S. 552, 569 (1925); *Dorchy v. Kansas*, 264 U. S. 286 (1924)).*

Furthermore, in construing the Transportation Act, 1920, this Court has twice strongly intimated that legislation establishing compulsory negotiation would violate the Fifth Amendment.

In the first *Pennsylvania Case* (*Pennsylvania Railroad Company v. United States Railroad Labor Board*, 261 U. S. 72, 84, 85 (1923)) the carrier objected that the Labor

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* This Court's interpretation of the word "liberty" as used in the Fifth Amendment has been well summarized in 3 Willoughby on the Constitution of the United States (2nd ed. 1929), 1802, as follows:

> "In further protection of the substantive rights of individuals against public regulation the courts have developed a broad conception of 'liberty' which makes it include not only personal freedom from physical restraint but the right to the free use of one's own property and to enter into contractual relations. So far as the use of one's private property is concerned, the right is viewed as also a property right as has earlier appeared. So far as the right to enter into contracts is concerned, it also is sometimes viewed as a property right, but more often as included within the broadened conception of liberty."

See also the well-known definition by this Court in *Allgeyer v. Louisiana* 165 U. S. 578, 589 (1897):

> "The liberty mentioned in that amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned."

Board compelled it to recognize labor unions as factors in the conduct of its business. The Court said:

> "The statute does not require the railway company to recognize or to *deal with or confer with labor unions*. It does not require employees to deal with their employers through their fellow employees. But we think it does vest the Labor Board with power to decide how such representatives *ought* to be chosen, with a view to securing a satisfactory co-operation, and leaves it to the two sides to accept or reject the decision. * * *
>
> "All that we may do in this case is to hold, as we do, that they [the Labor Board's decisions] were within the lawful function of the board to render, and, *not being compulsory*, violate no legal or equitable right of the complaining company."

The intimation that a mandatory order to negotiate would violate due process is repeated in the second *Pennsylvania Case* (*Pennsylvania Railroad System v. Pennsylvania Railroad Company*, 267 U. S. 203, 217 (1925)). The labor organization charged in this case that the Pennsylvania Railroad had failed to comply with the decision of the Labor Board *in refusing to confer* with representatives of the labor organization. The Court said:

> "All these things it [the railroad] might do and remain within its strict legal rights."

This Court also emphasized the sanction of publication and public opinion. It is important to note, moreover, that there is a limitation even upon this form of sanction. In *Holcombe v. Creamer*, 231 Mass. 99, 109, 120 N. E. 354, 359 (1918), the Court, while holding legislation valid on the ground that no legal compulsion was imposed on employers and employees which interfered with their liberty of contract, nevertheless held that compulsion

through the force of public opinion might reach a point where legislation having for its purpose the mobilization of public opinion in support of the recommendations of a labor board would become unconstitutional. The Court said:

> "The coercion resulting from legislation, in form not compulsory, may in practice be so severe as to leave no alternative save compliance. In such a case its validity would depend not upon its form but its substance."

Nothing contained in the *Texas* case is in any way contrary to the views here expressed.* The Circuit Court of Appeals, however, thought that the contention now urged by the Railway had been resolved adversely to it in that case. But the Railway Labor Act of 1926, or more correctly the provision thereof in controversy in the case,** was expressly upheld therein upon the ground that it did not interfere with the employer's liberty of contract. In the *Texas* case this Court said (at pp. 570-571):

> "The petitioners invoke the principle declared in Adair v. United States, 208 U. S. 161, and Coppage v. Kansas, 236 U. S. 1, but these decisions are inapplicable. The Railway Labor Act of 1926 does not interfere with the normal exercise of the right of the carrier to select its employees or to discharge

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*It is true that in the *Texas* case there was an order in contempt proceedings directing the railroad to reinstate the Brotherhood as the representative of the employees until an election could be held. This order, however, was not made to enforce a statutory obligation, but to require the restoration of the *status quo* as a condition of purging the railroad of contempt.

** In the *Texas* case (at pp. 557-558) this Court quoted Section 2, Third, of the Act, the paragraph providing that representatives shall be chosen "without interference, influence, or coercion", and said:

> "The controversy is with respect to the construction, validity and application of this statutory provision."

> them. The statute is not aimed at this right of the employers but at the interference with the right of employees to have representatives of their own choosing. As the carriers subject to the act have no constitutional right to interfere with the freedom of the employees in making their selections, they cannot complain of the statute on constitutional grounds."

The distinction between the cases involving the right of employers to hire and discharge employees at will and the cases involving the right of employees to belong to labor unions and select their representatives without interference is pointed out and emphasized by a decision of the Court of Appeals of New York, in which the above quoted excerpt from the *Texas* case was referred to and quoted in part in the opinion. *Sherman v. Abeles*, 265 N. Y. 383, 193 N. E. 241 (1934).

Finally, the abridgment of liberty of contract here attempted is arbitrary and unreasonable. It is not only beyond the limits of effective Federal statutory control, it is beyond the limits, as we have shown above, of the powers of a court of equity (*supra*, pp. 26-29). As Judge Story pointed out long ago, in *Tobey v. Bristol*, Fed. Cas. No. 14065, at p. 1321 (C. C. Mass., 1845), the courts have uniformly refused to enforce contracts for personal services depending upon the will and skill of the contracting parties. "In all these cases", he wrote, "the reason is the same, the utter inadequacy of the means of the court to enforce the due performance of such a contract." Here the statutory direction to "treat with", if "treat with" means "negotiate with", is utterly futile. Negotiation is entirely a matter of state of mind, a condition in its nature completely beyond legislative or judicial control. Furthermore, the direction to negotiate is also futile since the ultimate result of any conference is admittedly without the scope of control.

(b) The injunction restraining the Railway from contracting with anyone except the Federation is a violation of the due process clause of the Fifth Amendment.

Paragraph 2 of the decree enjoins the Railway from entering into any contract, undertaking or agreement concerning rules, rates of pay or working conditions affecting its mechanical department employees except with the Federation (R. 283). The Circuit Court of Appeals, by affirmance, has construed the Railway Labor Act as forbidding a carrier, when a representative of employees has been certified by the Mediation Board under Section 2, Ninth, from entering into any contract, undertaking or agreement concerning rules, rates of pay or working conditions affecting such employees except with such representative. Thus the carrier is deprived of the right to bargain or contract with those of its employees who do not desire such representation; and this is so whether the carrier desires to contract directly with an individual in the minority or indirectly through an organization by which the minority desires to be represented. If the Act empowers the majority to speak for the minority, it in effect delegates to the majority the right to prevent the carrier from making a contract with the minority which the minority may be willing to make. A somewhat similar delegation to the majority of power to bind the minority was recently condemned by this Court in *Carter v. Carter Coal Company*, 298 U. S. 238 (1936), as "legislative delegation in its most obnoxious form" and an "intolerable and unconstitutional interference with personal liberty and private property" in derogation of the due process clause of the Fifth Amendment.

Under the cases hereinabove cited, Section 2, Ninth, of the Railway Labor Act, as construed by the Circuit

Court of Appeals, it is submitted, deprives the Railway of its liberty and property in violation of the due process clause of the Fifth Amendment.

III. THE RAILWAY LABOR ACT IS UNCONSTITUTIONAL IN ITS ENTIRETY IN THAT IT ATTEMPTS TO REGULATE LABOR RELATIONS BETWEEN CARRIERS AND EMPLOYEES ENGAGED SOLELY IN ACTIVITIES INTRASTATE IN CHARACTER WHICH DO NOT DIRECTLY AFFECT OR BURDEN INTERSTATE COMMERCE.

The Railway Labor Act in terms applies to employees of carriers engaged solely in intrastate activities not directly affecting or burdening interstate commerce. Of course, it is well settled that regulation of so much of a business as constitutes interstate commerce or directly affects or burdens such commerce cannot be extended to embrace purely intrastate activities. First *Employers' Liability Cases*, 207 U. S. 463 (1908); *Baltimore and Ohio Railroad Company v. Interstate Commerce Commission*, 221 U. S. 612 (1911). In this respect the Act is inseparable; it cannot be aided by construction or by the separability clause. The Act, accordingly, is invalid in its entirety.

(a) The Railway Labor Act does not exclude from its application employees engaged solely in activities intrastate in character which do not directly affect or burden interstate commerce.

Section 1, Fifth, of the Railway Labor Act states that "the term 'employee' as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders

of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is hereby conferred upon it to enter orders amending or interpreting such existing orders. * * *" By its order dated April 18, 1921, approving the *Rules Governing the Classification of Steam Railway Employees and Reports of their Service and Compensation,* effective July 1, 1921, the Interstate Commerce Commission defined employees as follows:

> "The word *employees,* as used herein, is intended to include every person in the service of the reporting carrier subject to its continuing authority to supervise and direct the manner of rendition of his service. Persons engaged to render only specifically defined service and not subject to the continuing authority of the carrier to supervise and control their acts, such as customhouse brokers, lawyers retained only for specific cases and not under general or continuing retainer, etc., are not employees in the meaning of the term used herein." (*Rules Governing the Classification of Steam Railway Employees and Reports of their Service and Compensation,* Effective on July 1, 1921, Interstate Commerce Commission, Washington, Government Printing Office, 1921, p. 7).

The foregoing is the Interstate Commerce Commission's definition of "employees" in effect at the time of the passage of the Railway Labor Act of 1926 and still in effect. It is to be observed that the definition in the Act itself is patterned upon it. It is also to be observed that no distinction is attempted to be drawn between employees whose activities are interstate in character and employees whose activities are solely intrastate in character and do not directly affect or burden interstate commerce. It follows that the Railway Labor Act purports

to regulate the relations of carriers by railroad with all employees subject to their continuing authority to supervise and direct the manner of rendition of their services, including employees such as the back-shop employees of the Railway who are engaged solely in activities intrastate in character which do not directly affect or burden interstate commerce.

(b) The Railway and other carriers subject to the Railway Labor Act have employees engaged solely in activities intrastate in character which do not directly affect or burden interstate commerce.

It is clear from the evidence that the back-shop employees are engaged solely in intrastate activities and this was the conclusion reached by the District Court (R. 270) and adopted by the Circuit Court of Appeals (R. 313).

Approximately one-third of the employees in the mechanical department of the Railway work in the back shop at Princeton, West Virginia. As appears from the testimony, these back-shop employees (with the exception of one man who makes "running repairs" on a switch engine maintained at Princeton) are engaged in making "classified repairs" and in "store order work." Classified repairs are heavy repairs on locomotives and cars, such as rebuilding and putting them in shape for months of service. It is customary to distinguish heavy or classified repairs from light or running repairs. For the purpose of making classified repairs, the locomotives and cars are withdrawn from service for an average of approximately 105 days in the case of locomotives and for an average of approximately 109 days in the case of cars. "Store order work" consists of manufacturing

material (such as rivets and repair parts) to be placed in stores at different points on the railroad. If the Railway can make these articles more cheaply than it can buy them, they are made at its back shop; otherwise they are bought on the market. (*Supra*, pp. 4-5).

It is the position of the Railway that such back-shop work is not so related to the interstate activities of the Railway as to admit of Federal regulation of the employer-employee relationships of such back-shop employees. This question, so far as the Railway has been able to discover, has not been directly decided by this Court. There is, however, ample authority in support of the Railway's position. In the first *Employers' Liability Cases*, 207 U. S. 463 (1908), this Court pointed out that although a carrier might be engaged in interstate commerce it might also transact business which was not interstate in character and which did not directly affect or burden interstate commerce. This Court mentioned work of the type performed by the Railway's back-shop employees at Princeton as an illustration of the latter. This Court said (at p. 498):

> "The act, then, being addressed to all common carriers engaged in interstate commerce, and imposing a liability upon them in favor of any of their employees, without qualification or restriction as to the business in which the carriers or their employees may be engaged at the time of the injury, of necessity includes subjects wholly outside of the power of Congress to regulate commerce. Without stopping to consider the numerous instances where, although a common carrier is engaged in interstate commerce, such carrier may, in the nature of things, also transact business not interstate commerce, although such local business may indirectly be related to interstate commerce, a few illustrations showing the operation of the statute as to matters wholly independent of

interstate commerce will serve to make clear the extent of the power which is exerted by the statute. Take a railroad engaged in interstate commerce, having a purely local branch operated wholly within a state. *Take again the same road having shops for repairs, and, it may be, for construction work,* as well as a large accounting and clerical force, and having, it may be, storage elevators and warehouses, not to suggest, besides, the possibility of its being engaged in other independent enterprises. Take a telegraph company engaged in the transmission of interstate and local messages. Take an express company engaged in local as well as in interstate business. Take a trolley line moving wholly within a state as to a large part of its business, and yet, as to the remainder, crossing the state line.

"As the act thus includes many subjects wholly beyond the power to regulate commerce, and depends for its sanction upon that authority, it results that the act is repugnant to the Constitution, and cannot be enforced unless there be merit in the propositions advanced to show that the statute may be saved."

The recent decisions of this Court under the second *Federal Employers' Liability Act,* although not controlling on the question at issue, are also indicative of the Court's attitude towards the problem. In *New York, New Haven and Hartford Railroad Co. v. Bezue,* 284 U. S. 415 (1932), the leading case on the subject, this Court held that the criterion of applicability of the second *Federal Employers' Liability Act* was the employee's occupation at the time of his injury in interstate transportation or work so closely related thereto as to be practically a part of it. The employee in that case, in laboring in the repair shop, was injured through the negligence of the foreman while assisting in returning a pair of main driving wheels from a lathe to the engine from which they had been removed for the purpose of

turning the journals. The locomotive had apparently been used in interstate service and had been brought to the shop for regular boiler wash. The repairs consumed twelve days and the employee was injured on the ninth day. The Court of Appeals of New York had affirmed a judgment in favor of the employee on the ground "that the terminal facilities in which respondent worked constitute a part of the railroad's system necessary to the operation of the road and to the conduct of interstate commerce." This conclusion was rejected, however, by this Court. This Court said (at p. 419):

> "The test thus applied is broader than our decisions justify. All work performed in railroad employment may, in a sense, be said to be necessary to the operation of the road. The business could not be conducted without repair shop employees, clerks, janitors, mechanics, and those who operate all manner of appliances not directly or intimately concerned with interstate transportation as such, or with facilities actually used therein. But we have held that the mere fact of employment does not bring such employees within the Act. * * *
>
> "The criterion of applicability of the statute is the employee's occupation at the time of his injury in interstate transportation or work so closely related thereto as to be practically a part of it. * * * Under the circumstances of this case, whether respondent is within the Act must be decided not by reference to the kind of plant in which he worked, or the character of labor he usually performed, but by determining whether the locomotive in question was, at the time of the accident, in use in interstate transportation or had been taken out of it. The length of the period during which the locomotive was withdrawn from service and the extent of the repairs bring the case within the principle announced in Industrial Acci. Commission v. Davis, 259 U. S. 182, and Minneapolis & St. L. R. Co. v. Winters, 242

> U. S. 353, stamp the engine as no longer an instrumentality of or intimately connected with interstate activity, and distinguish such cases as New York C. R. Co. v. Marcone, 281 U. S. 345, where the injured employee was oiling a locomotive which had shortly before entered the roundhouse after completing an interstate run."

See, to same effect, *Industrial Accident Commission v. Davis,* 259 U. S. 182 (1922), and *Minneapolis and St. Louis R. Co. v. Winters,* 242 U. S. 353 (1917).

Furthermore, the work of the back-shop employees at Princeton is manufacture. This Court has long held that manufacture is not commerce. *Crescent Cotton Oil Company v. Mississippi,* 257 U. S. 129 (1921); *Carter v. Carter Coal Company,* 298 U. S. 238 (1936). As this Court has pointed out there is a broad and clear distinction between manufacture and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce. *Kidd v. Pearson,* 128 U. S. 1, 20 (1888). That commodities produced or manufactured within a state are intended to be sold or transported outside the state or otherwise enter into commerce does not render their production or manufacture subject to Federal regulation under the commerce clause. *Carter v. Carter Coal Company, supra; Coe v. Errol,* 116 U. S. 517 (1886); *Arkadelphia Milling Company v. St. Louis, Southwestern Railway Company,* 249 U. S. 134 (1919); *Heisler v. Thomas Colliery Company,* 260 U. S. 245 (1922); *Chassaniol v. City of Greenwood,* 291 U. S. 584 (1934).

The Circuit Court of Appeals was of the opinion that back-shop employees are subject to Federal regulation because in the event of a strike by such workers the interstate activities of the Railway may be interfered with. There are at least two conclusive reasons why this test is entirely inadequate and untenable:

(1) It is untenable for the obvious reason that it does not possess the necessary characteristic of a standard. The chief characteristic of a standard is that it draws a dividing line so that it is possible to tell whether a particular class is on one side of the line or the other. The strike standard fails utterly as a dividing line because, by such standard, all activities, no matter how local in character, would be held to directly burden or affect interstate commerce inasmuch as any interruption of such activities by strikes to some extent would affect the stream of interstate commerce. The back-shop work is just as local as similar work done by concerns such as the Baldwin Locomotive Works and the Virginia Bridge and Iron Works. It is clear under *Carter v. Carter Coal Company, supra,* that employer-employee relations in the case of these two concerns could not be subjected to Federal regulation on the ground that a strike or labor disturbance therein might interfere with interstate commerce. As was stated in the *Carter* case (pp. 308-309), the relation of such employers and employees is a local relation; and strikes of such employees are a local evil over which the Federal government has no legislative control, and such effect as they may have upon commerce, however extensive it may be, is secondary and indirect. The mere fact that the Railway has chosen to perform such back-shop work itself does not render such work subject to Federal regulation. The Circuit Court of Appeals has failed to give proper consideration to the

fact that the Railway, in engaging in the back-shop work, is engaged in purely local activities that are as separate and apart from its transportation business as manufacturing or mining. *Carter v. Carter Coal Company, supra.*

(2) The strike test is also untenable because a strike of the back-shop employees resulting in a total shutdown of the back shop would not directly interfere with the interstate operations of the Railway. It is manifest from the testimony that the Railway could permanently close the Princeton shop tomorrow without occasioning any interruption to its interstate service. As the testimony shows, the back-shop employees have no connection with equipment in service. As the testimony also shows, all the work done in the back shop could be handled by outside shops such as those of the Baldwin Locomotive Works and the Virginia Bridge and Iron Works, and the material made at Princeton could be purchased in the market.

The Circuit Court of Appeals seeks to fill a gap which would otherwise exist in its reasoning by saying (R. 330) that "if labor disturbances of employees such as those who are involved here, warrant the exercise of injunctive power to prevent interference with interstate commerce, as was asserted by the defendant here in the shopmen's strike of 1922 and as held in *United States v. Railway Employees' Department,* 283 Fed. 479 and 290 Fed. 978, certainly Congress can take appropriate steps to prevent such interference in advance of the disturbance." But in the case of the Railway only one-third of the shopmen are back-shop employees and an examination of the opinions cited fails to disclose any basis for a statement that a strike of back-shop employees did or would directly interfere with interstate commerce. Direct interference with interstate com-

merce from a shopmen's strike is due, not to the back-shop employees, but to the shopmen employed in making running repairs.

It follows therefore that the activities of the back-shop employees are purely intrastate in character and do not directly affect or burden interstate commerce.

Moreover the Railway Labor Act is addressed to all carriers by railroad subject to the Interstate Commerce Act. As noted above it purports to regulate the relations of such carriers with all employees subject to their continuing authority to supervise and direct the manner of rendition of their services. Even if this Court should hold that the activities of back-shop employees directly affect or burden interstate commerce and, therefore, that such employees may be subjected to Federal regulation, it may nevertheless take judicial notice of the fact that at least some of such carriers have other employees whose activities do not directly affect or burden interstate commerce.*

(c) As an attempted regulation of intrastate activities, the Act is inseparable; it cannot be aided by construction or the separability clause.

(i) *As an attempted regulation of intrastate activities the Act is inseparable; it cannot be aided by construction.*

As we have shown above the Railway Labor Act in terms applies to all employees of interstate carriers irrespective of the fact that some of their employees may be engaged solely in intrastate activities which do not affect or burden interstate commerce; it applies, for example, to those engaged exclusively in work related to

* See the quotation from the first *Employers' Liability Cases, supra,* pp. 41-42.

the management, operation, care and protection of property not devoted to or used in connection with transportation. It is well settled that when, in the attempted exercise of duly delegated Federal power, an act attempts to regulate activities both within and outside the scope of Federal power without distinction between the two, it is wholly void. Under the decisions of this Court, if this situation exists, the courts are bound to declare the act void as an entirety. They cannot merely hold it invalid in its application to intrastate activities. This rule has been announced in many cases, a few of which will be discussed in detail.

(1) In *United States v. Reese*, 92 U. S. 214 (1876), this Court held unconstitutional the Act of May 31, 1870, 16 Stat. 140, which laid a penalty on state election officers for refusal to receive the vote of "any citizen" who had duly offered to qualify as a voter. An indictment was brought against two inspectors of a municipal election in the State of Kentucky for violation of the Act, which was not in terms limited to Federal elections. The Court held (at p. 221):

> "We are, therefore, directly called upon to decide whether a penal statute, enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose, we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not

now there. Each of the sections must stand as a whole or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only.

"It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. This would, to some extent, substitute the Judicial for the Legislative Department of the Government. The courts enforce the legislative will when ascertained, if within the constitutional grant of power. Within its legitimate sphere, Congress is supreme and beyond the control of the courts; but if it steps outside of its constitutional limitation and attempts that which is beyond its reach, the courts are authorized to, and when called upon in due course of legal proceedings must, annul its encroachments upon the reserved power of the States and the people.

"To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty."

(2) In the *Trade-Mark Cases*, 100 U. S. 82 (1879), this Court held that the commerce clause gives to Congress no power to establish a general or universal system of trade-mark registration, that is, one which is not confined to trade-marks used in foreign or interstate commerce. Hence the Acts of 1870 and 1876, which were not in terms so confined, were held invalid. This Court said (at pp. 96-97):

"When, therefore, Congress undertakes to enact a law, which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of

the statute, or from its essential nature, that it is a regulation of commerce with foreign nations, among the several States, or with the Indian Tribes. If it is not so limited, it is in excess of the power of Congress. If its main purpose be to establish a regulation applicable to all trade; to commerce at all points, especially if it is apparent that it is designed to govern the commerce wholly between citizens of the same State, it is obviously the exercise of a power not confided to Congress.

"We find no recognition of this principle in the chapter on trade marks in the Revised Statutes."

(3) In *James v. Bowman*, 190 U. S. 127 (1903), this Court declined by judicial construction to limit the application of a statute to Federal elections which in terms provided for the punishment of bribery committed at all elections, without limiting the elections to Federal elections. It said (at p. 140):

"On its face it is clearly an attempt to exercise power supposed to be conferred by the 15th Amendment in respect to all elections, and not in pursuance of the general control by Congress over particular elections. To change this statute, enacted to punish bribery of persons named in the 15th Amendment at all elections, to a statute punishing bribery of any voter at certain elections would be in effect judicial legislation. It would be wresting the statute from the purpose with which it was enacted and making it serve another purpose. Doubtless even a criminal statute may be good in part and bad in part, providing the two can be clearly separated, and it is apparent that the legislative body would have enacted the one without the other, but there are no two parts to this statute."

(4) In *Illinois Central Railroad Company v. McKendree*, 203 U. S. 514 (1906), this Court held invalid quarantine regulations promulgated by the Secretary of Agri-

culture acting under cover of the Act of February 2, 1903. The Court said (at pp. 528-529):

> "The terms of order 107 apply to all cattle transported from the south of this line to parts of the United States north thereof. It would, therefore, include cattle transported within the state of Tennessee from the south of the line as well as those from outside that state; there is no exception in the order, and in terms it includes all cattle transported from the south of the line, whether within or without the state of Tennessee. It is urged by the government that it was not the intention of the Secretary to make provision for intrastate commerce, as the recital of the order shows an intention to adopt the state line, when the state by its legislature has passed the necessary laws to enforce the same completely and strictly. But the order in terms applies alike to interstate and intrastate commerce. A party prosecuted for violating this order would be within its terms if the cattle were brought from the south of the line to a point north of the line within the state of Tennessee. It is true the Secretary recites that legislation has been passed by the state of Tennessee to enforce the quarantine line, but he does not limit the order to interstate commerce coming from the south of the line, and, as we have said, the order in terms covers it. We do not say that the state line might not be adopted in a proper case, in the exercise of Federal authority, if limited in its effect to interstate commerce coming from below the line, but that is not the present order, and we must deal with it as we find it. Nor have we the power to so limit the Secretary's order as to make it apply only to interstate commerce, which it is urged is all that is here involved. For aught that appears upon the face of the order, the Secretary intended it to apply to all commerce, and whether he would have made such an order, if strictly limited to interstate commerce, we have no means of knowing. The order is in terms single and indivisible."

(5) In the first *Employers' Liability Cases, supra,* this Court held the *Federal Employers' Liability Act* of June 11, 1906, void on the ground that it was a regulation of intrastate as well as interstate commerce and, therefore, one beyond the power of Congress to enact. The Court expressly refused to write into the Act the words necessary to limit its application to interstate commerce.

The rule applied by the preceding cases was stated recently as follows by Mr. Justice Brandeis in his dissenting opinion in *Crowell v. Benson,* 285 U. S. 22, 76-77 (1932). The point was not touched upon in the majority opinion.

> "The court may not, in order to avoid holding a statute unconstitutional, engraft upon it an exception or other provision. Butts v. Merchants & M. Transp. Co., 230 U. S. 126, 133; Employers' Liability Cases (Howard v. Illinois C. R. Co.), 207 U. S. 463, 500-502; Trade-Mark Cases, 100 U. S. 82, 99; United States v. Fox, 95 U. S. 670, 672, 673; United States v. Reese, 92 U. S. 214, 221. Compare Illinois C. R. Co. v. McKendree, 203 U. S. 514, 529; Cella Commission Co. v. Bohlinger, 147 Fed. 419, 423, 424."

When, therefore, as in the present case, an act of Congress is, by its terms, expressly made applicable to local activities beyond the power of Congressional regulation, it is null and void as an entirety. The courts may not declare it invalid only in so far as it relates to intrastate matters. To do so is to indulge in judicial legislation and to violate the principle announced in the preceding cases.

(ii) *The Act cannot be aided by the separability clause.*

Nor does the separability provision* save the Act or

*** See Section 8 of the 1934 Amendments and the footnote, Appendix p. 74.**

any part of it. It is well settled that when the court can make an act constitutional by striking out words or phrases it may do so, but it is also well settled that the court will not add words of limitation in order to make an invalid act valid. We quote below from *Hill v. Wallace,* 259 U. S. 44, 70-71 (1922), a recent statement of this traditional doctrine:

> "Section 11 of this act directs that 'if any provision of this act or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the act and of the application of such provision to other persons and circumstances shall not be affected thereby.'
>
> "Section 4, with its penalty to secure compliance with the regulations of boards of trade, is so interwoven with those regulations that they cannot be separated. None of them can stand. Section 11 did not intend the court to dissect an unconstitutional measure and reframe a valid one out of it by inserting limitations it does not contain. This is legislative work beyond the power and function of the court. In United States v. Reese, 92 U. S. 214, presenting a similar question as to a criminal statute, Chief Justice Waite said (p. 221):
>
> " 'We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole, or fall together. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined, is whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only. • • • To limit this statute in the manner now asked for would be to make a

new law, not to enforce an old one. This is no part of our duty.' • • •

"To be sure in the cases cited there was no saving provision like §11, and undoubtedly such a provision furnishes assurance to courts that they may properly sustain separate sections or provisions of a partly invalid act without hesitation or doubt as to whether they would have been adopted, even if the legislature had been advised of the invalidity of part. But it does not give the court power to amend the act."

This doctrine was recently affirmed in *Railroad Retirement Board v. Alton R. Co.*, 295 U. S. 330, 361 (1935), in which the act under review contained a separability clause similar to that considered in *Hill v. Wallace*.

It is submitted that under the authorities aforesaid the Railway Labor Act is unconstitutional in its entirety.

IV. THE CERTIFICATION OF THE MEDIATION BOARD IS A NULLITY (A) BECAUSE IT FAILS TO SHOW THAT A MAJORITY OF ANY CRAFT OR CLASS OF EMPLOYEES VOTED IN FAVOR OF THE FEDERATION, OR EVEN THAT SUCH A MAJORITY PARTICIPATED IN THE ELECTION, AND (B) BECAUSE IT IS IMPOSSIBLE TO TELL FROM IT WHAT THE RESULT OF THE ELECTION WOULD HAVE BEEN WITHOUT THE VOTES OF THE BACK-SHOP EMPLOYEES.

The mandatory injunction awarded by paragraph 1 of the decree requiring the Railway to negotiate with the Federation and the part of paragraph 2 of the decree which enjoins the Railway from entering into any contract, undertaking or agreement concerning rules, rates of pay or working conditions affecting its mechanical department employees except with the Federation are grounded solely upon the certification of the Mediation

Board of the Federation as the representative of the mechanical department employees of the Railway. If this certification is a nullity, paragraph 1 of the decree and the part of paragraph 2 of the decree referred to above should be vacated. It is the contention of the Railway that this certification is a nullity for each of the two reasons hereinafter set forth.

(a) The certification of the Mediation Board is a nullity because it fails to show that a majority of any craft or class of employees voted in favor of the Federation, or even that such a majority participated in the election.

(i) *Section 2, Fourth, of the Railway Labor Act requires, in an election to determine who is the representative of a craft or class, that the representative receive the votes of a majority of the eligible voters of such craft or class.*

The certification of the Mediation Board to the effect that the Federation has been duly designated and authorized to represent the mechanical department employees of the Railway shows on its face that the election on which it is based was conducted under a rule, agreed to by the candidates, "that the vote should be taken and counted separately for each of the shop crafts, and that each organization receiving a majority of the legal votes cast will be recognized as representative of the employees in question", thus permitting a choice to be made in any craft by less than a majority thereof. As will be shown hereafter, this is clearly an improper rule. Furthermore, the certification fails to show that a majority of any craft or class of employees eligible to vote voted in favor of the Federation, or even that such a majority participated in the election. (*Supra*, p. 7).

Section 2, Fourth, of the Railway Labor Act provides, "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act". The District Court held that this statutory provision did not require the representative to receive the votes of a majority of all the eligible voters of a craft or class, but merely that a majority thereof actually participate in the election (R. 266-267). The Circuit Court of Appeals also held that if a majority of a craft participated in an election, a majority of those voting was sufficient to elect. It said, however, that it did not need to decide in this case whether the choice of a majority of those voting would also be valid if a majority of the eligible voters did not participate in the election (R. 339).

The lower courts, it is submitted, misinterpreted the statute in holding that Section 2, Fourth, does not require, in the case of an election to determine who is the representative of a craft or class, that the representative receive the votes of a majority of all the eligible members of such craft or class.* The Railway believes that it re-

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* No light upon the construction of the sentence, "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act", is thrown by Committee Reports. The following, however, appears in the *Report from the Committee on Interstate Commerce, to accompany S. 3266, Senate, 73d Congress, 2d Session, Report No. 1065, May 10 (calendar day May 21), 1934, p. 2*:

> "The bill specifically provides that the choice of representatives of any craft shall be determined by a majority of the employees voting on the question."

It is submitted that this was not intended to mean that a majority of the votes cast would determine the choice, but that the choice would be determined by the vote of a majority of those having the right to vote. In any event, that is

quires that the representative receive the votes of a majority of all the eligible members of such craft or class; otherwise less than a majority would have the right to choose the representative and thus control the terms of agreements concerning rates of pay, rules and working conditions of all the members of the craft or class. It was the manifest purpose of Congress to provide a plan to eliminate as far as possible continual disagreements between carriers and employees and among the employees themselves. This purpose would be thwarted if a minority of a craft or class were permitted to determine such matters, because where less than a majority approves a designated representative there is a tendency for the losing party to seek another election and the issue may

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what the Hon. Joseph B. Eastman, Federal Coordinator of Transportation and proponent of the 1934 amendments, told the Committee on Interstate and Foreign Commerce of the House was the meaning of the sentence. On May 22, 1934, in answer to questions by Congressman Pettengill as to its meaning, he said,

> "* * * with that provision in paragraph 4, I think the rules would have to provide for *a majority of those who are determined to have the right to vote* * * * I think that the vote would have to be a majority of those that have the right to vote and participate in the elections. I would like to give that a little further consideration". (*Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, Seventy-third Congress, Second Session, on H. R. 7650,* pp. 34-35.)

On the following day, Commissioner Eastman said (p. 44) that he would like to work out an amendment to "make clear the point with respect to what 'majority' means, which was raised in a question asked by Congressman Pettengill". No such amendment was adopted (or, as far as appears, presented), and it is to be assumed that the Committee was satisfied that the sentence expressed with sufficient clarity the meaning ascribed to it by Commissioner Eastman.

not be regarded as definitely settled until a majority of the eligible employees agree upon their choice.*

Moreover the interpretation of the lower courts is contrary to the administrative interpretation adopted by the Mediation Board prior to the decision of the District Court in this case. In the *Second Annual Report of the National Mediation Board, for the fiscal year ended June* 30, 1936, at page 11, the following statement appears:

> "(*a*) *Majority rule.*—During the year the Board, guided by decision of the courts, changed its ruling with respect to the majority required to determine

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* Mr. James W. Carmalt, a member of the National Mediation Board, in an address before the Fifth Organization Conference of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, at St. Louis, Missouri, in November of 1935, said:

> "The Railway Labor Act says that the majority of a class or craft shall have the right to determine who its representatives shall be. *Our Board has felt that it was good administration at least to read the Act strictly in accordance with its terms. In other words, to require that there be a majority of the eligible voters recorded in favor of one organization before we could issue a certificate to it. We have felt this was wise because it prevents slipshod organization work and leads to stability.* We have had several instances where the election was close, in which we have been requested almost immediately after it was concluded to hold another election. If there were a clear majority of the eligible voters recorded on one side or the other, the losing organization would not be active in further efforts to get control and the winning organization would be in much better position to negotiate with the management. * * * *The organization that obtains the contract by reason of a minority of the votes in a class will generally have rough sledding in the administration of the contract for the employees.*" ("*Railway Clerk*," Official Journal of Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, December, 1935, p. 473.)

the election of representatives. In its first rules governing elections the Board had adopted the policy of requiring a majority of all those eligible to vote to determine the choice of representatives. The matter was taken to the courts, however, and Judge Way in the United States District Court for the Eastern District of Virginia ruled that only a majority of the legal votes cast was necessary, provided a majority of all the eligibles participated in the election. This ruling was upheld by the United States Circuit Court of Appeals for the Fourth Circuit.

"Following the court's ruling the Board had occasion to consider the question again in a representation dispute involving the shop employees of the Nashville, Chattanooga and St. Louis Railway Co. [Case No. R-170] in which the Board changed its ruling with respect to the required majority in the following language:

> In some elections heretofore held the Board has ruled, for administrative reasons, that it would not certify as the choice of representative by employes any individual or organization which failed to receive a majority of the eligible votes. By judicial decision and opinion of competent counsel, the Board is constrained now to hold that where a majority of the eligible voters participate in the election and all are given opportunity so to vote, a majority of the legal votes cast will determine the right to certification by the Board of the representation chosen by the class or craft.

This ruling is now generally accepted, but the Virginian Railway Co. proposes to pursue the litigation to the United States Supreme Court."*

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* It appears from the *First Annual Report of the Mediation Board* (*Report for the fiscal year ended* June 30, 1935), p. 19, that when the parties to a dispute agreed to be bound by a majority of the votes cast, the Mediation Board for a time certified on this basis. However, it is obvious that

(ii) *The certification of the Mediation Board does not show compliance with the statutory requirement.*

It is impossible to tell from the certification whether or not a majority of any craft or class of employees eligible to vote voted in favor of the Federation, or even whether or not such a majority participated in the election. Under these circumstances, it is submitted that the certification clearly does not contain sufficient findings of fact to meet the requirements declared by this Court to be essential in such a case, whether the construction of the District Court or that of the Railway be adopted.

Thus in *United States v. Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 504, 505 (1935), it was said:

> "This court has held that an order of the Interstate Commerce Commission is void unless supported by findings of the basic or quasi-jurisdictional facts conditioning its power. Florida v. United States, 282 U. S. 194, 215, 75 L. ed. 291, 304, 51 S. Ct. 119; United States v. Baltimore & O. R. Co., January 7, 1935, 293 U. S. 454. 'In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit.' Florida v. United States, 282 U. S. 194."

And in *Atchison, T. & S. F. R. Co. v. United States*, 295 U. S. 193, 201, 202 (1935), this Court said:

> "But the Commission, in respect of the shipments covered by its order, made no definite finding as to

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agreements between candidates, as in this case, cannot change the requirements of the statute. The District Court so ruled and accordingly held the certification of the Federation as the representative of the carmen and coach cleaners to be "without force or effect" (R. 267, 280). No appeal was taken by the respondents from this ruling (R. 339).

what constitutes complete delivery or where transportation ends. Its report does not disclose the basic facts on which it made the challenged order. This court will not search the record to ascertain whether, by use of what there may be found, general and ambiguous statements in the report intended to serve as findings may by construction be given a meaning sufficiently definite and certain to constitute a valid basis for the order. In the absence of a finding of essential basic facts, the order cannot be sustained. Florida v. United States, 282 U. S. 194, 215. Recently this court has repelled the suggestion that lack of express finding by an administrative agency may be supplied by implication. Panama Ref. Co. v. Ryan, 293 U. S. 388, 433."

Under the above cases, it is submitted, the certification, under either construction of Section 2, Fourth, is a nullity.

(b) The certification is a nullity because it is impossible to tell from it what the result of the election would have been without the votes of the back-shop employees.

The certification of the Mediation Board is based upon an election at which the back-shop employees were permitted to vote and accordingly includes in the votes which it reports the votes of such back-shop employees (*supra*, p. 7). These employees are engaged solely in intrastate activities not directly affecting or burdening interstate commerce (*supra*, pp. 38-47). They are not subject to Federal regulation and accordingly their votes should not have been included. The certification does not report the votes of the back-shop employees separately and it is impossible to tell from it, for any craft, what the result of the election would have been if the votes of the back-shop employees had not been included. For this reason also, it is submitted, the certification of the Mediation Board is a nullity under the cases cited, *supra*, p. 60.

V. THE INJUNCTION BOTTOMED ON PUBLICITY GIVEN BY THE RAILWAY TO THE EXISTENCE OF, AND THE FACTS INVOLVED IN, A LABOR DISPUTE AND ON ACTS OF EMPLOYEES NOT PARTICIPATED IN, RATIFIED OR AUTHORIZED BY THE RAILWAY SHOULD NOT HAVE BEEN AWARDED, PARTICULARLY IN VIEW OF THE PROVISIONS OF SECTIONS 4 (e), 6 AND 7 (a) OF THE NORRIS-LAGUARDIA ACT.

The injunction awarded by paragraph 2 of the decree of the District Court, except the part thereof enjoining the Railway from contracting with anyone but the Federation, is bottomed on the posting by the Railway of certain bulletins (*supra*, pp. 5-6), the issuance by it of the Sasser statement (*supra*, p. 6), and acts of employees in respect of which there is no proof whatsoever of participation, authorization or ratification by the Railway (*supra*, pp. 7, 10). There is no contention that any of the financial assistance formerly given to the Association was continued after it became unlawful to give it (*supra*, p. 5). There is no evidence or finding of threats (*supra*, p. 10).

It is submitted that the bulletins and the Sasser statement were proper communications from employer to employees, not constituting forbidden attempts to "influence" such employees, as the word "influence" is used in Section 2, Third and Fourth, of the Railway Labor Act as amended. (See *Texas & N. O. R. Co. v. Brotherhood of Ry. & S. S. Clerks*, 281 U. S. 548, 568 (1930), construing the word "influence" in Section 2, Third, of the Railway Labor Act of 1926, to mean "pressure, the use of the authority or power of either party to induce action by the other in derogation of what the statute calls 'self-organization' ").

Moreover, even if the bulletins or the Sasser statement were unlawful under the Railway Labor Act, they could

not legally be made the basis of an injunction against the Railway. Section 1 of the Norris-LaGuardia Act specifically provides that "no court of the United States * * * shall have jurisdiction to issue any * * * injunction in a case involving or growing out of a labor dispute, *except in a strict conformity with the provisions of this Act*". Section 4 (e) of the Norris-LaGuardia Act provides that no court of the United States shall have jurisdiction to issue an injunction in a case involving or growing out of a labor dispute to prohibit any person participating or interested in such dispute from "Giving publicity to the existence of, or the facts involved in, any labor dispute" by a method not involving fraud or violence. All that the bulletins and the statement did was to give publicity to the existence of, and the facts involved in, a labor dispute, and an injunction bottomed thereon is tantamount to an injunction against giving in the future publicity to similar facts to the extent that they come within the wording of the decree. The decree in this case makes no attempt to exclude from its scope the giving of publicity which may not be enjoined. As an example, the Railway is enjoined, without qualification, from "discouraging its mechanical department employees from becoming or remaining members of the" Federation. Thus no publicity may be given to any facts about the Federation which would have that effect, such as the facts set forth in the Sasser statement.*

Section 6 of the Norris-LaGuardia Act provides that no "association or organization participating or interested in a labor dispute, shall be held responsible or liable * * * for the unlawful acts of individual officers,

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*The Norris-LaGuardia Act was approved March 23, 1932; the *Texas* case, *supra*, was decided May 26, 1930. Hence the decision in that case has no bearing upon the validity of this point.

members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof"; and Section 7 (a) prohibits the issuance of an injunction on account of a threat or unlawful act, except against a person, association or organization making or committing, or authorizing or ratifying, such threat or act. Therefore the acts of employees aforesaid, even if otherwise a proper basis of injunction against the Railway, could not legally be made the ground of such an injunction.

It is submitted, therefore, that the part of the injunction awarded by paragraph 2 of the decree of the District Court which is bottomed upon the posting of the bulletins, the issuance of the Sasser statement and acts of employees should not have been awarded, particularly in view of the above mentioned provisions of the Norris-LaGuardia Act.

VI. SECTION 9 OF THE NORRIS-LAGUARDIA ACT PROHIBITS THE GRANTING BY A COURT OF THE UNITED STATES OF A MANDATORY INJUNCTION IN A CASE INVOLVING OR GROWING OUT OF A LABOR DISPUTE.

Section 9 of the Norris-LaGuardia Act provides in part as follows:

> "* * * every restraining order or injunction granted in a case involving or growing out of a labor dispute *shall include only a prohibition* of such specific act or acts as may be expressly complained of in the bill of complaint * * *."

The mandatory injunction awarded by paragraph 1 of the decree is not *"only a prohibition"* and therefore clearly contravenes Section 9 inasmuch as the District Court was, under said Section 9, without jurisdiction to issue a mandatory injunction in this case.

CONCLUSION.

Paragraph 1 of the decree and the part of paragraph 2 which enjoins the Railway from contracting with anyone but the Federation must both fall if this Court determines (a) that Section 2, Ninth, of the Railway Labor Act does not impose a legally enforceable duty to negotiate, or (b) that if construed to impose such a duty it violates the due process of law clause of the Fifth Amendment, or (c) that the Railway Labor Act is unconstitutional in its entirety, or (d) that for either of the reasons advanced the certification of the Mediation Board is a nullity. Paragraph 1 of the decree must also fall if this Court determines that, in any event, a mandatory injunction should not have been awarded in view of Section 9 of the Norris-LaGuardia Act.

The part of paragraph 2 of the decree which enjoins the Railway from contracting with anyone but the Federation must fall if this Court determines that the Railway Labor Act violates the due process clause of the Fifth Amendment if construed to prevent a carrier from contracting with anyone but the representative certified by the Mediation Board when one has been certified. The rest of paragraph 2 of the decree must fall if this Court determines (a) that the Railway Labor Act is unconstitutional in its entirety, or (b) that, particularly in view of the provisions of Sections 4(e), 6 and 7(a) of the Norris-LaGuardia Act, an injunction, bottomed on publicity given by the Railway to the existence of, and the facts involved in, a labor dispute and on acts of employees not participated in, ratified or authorized by the Railway, could not properly be awarded.

For the reasons set forth herein, it is submitted that the decree of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

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January, 1937.

APPENDIX.

EXCERPTS FROM 1934 AMENDMENTS TO THE RAILWAY LABOR ACT

Act of June 21, 1934, Chap. 691, 48 Stat. 1185.

AN ACT

To amend the Railway Labor Act approved May 20, 1926, and to provide for the prompt disposition of disputes between carriers and their employees.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 1 of the Railway Labor Act is amended to read as follows:

"DEFINITIONS

"Section 1. When used in this Act and for the purposes of this Act—

"First. The term 'carrier' includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, * * *

"Second. The term 'Adjustment Board' means the National Railroad Adjustment Board created by this Act.

"Third. The term 'Mediation Board' means the National Mediation Board created by this Act.

"Fourth. The term 'commerce' means commerce among the several States or between any State, Territory, or the District of Columbia and any foreign nation, or between any Territory or the District of Columbia and any State, or between any Territory and any other Territory, or between any Territory and the District of Columbia, or within any Territory or the District of Columbia, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign nation.

"Fifth. The term 'employee' as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is hereby conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however,* That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this Act or by the orders of the Commission.

"Sixth. The term 'representative' means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them."

* * * * * *

(USC Title 45, §151.)

Sec. 2. Section 2 of the Railway Labor Act is amended to read as follows:

"GENERAL PURPOSES

"Sec. 2. The purposes of the Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all dis-

putes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions. (USC Title 45, §151a.)

"GENERAL DUTIES

"First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

"Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

"Third. Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

"Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of

their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

"Fifth. No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this Act, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

"Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided*, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated con-

ferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further*, That nothing in this Act shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

"Seventh. No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

"Eighth. Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this Act, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

"Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of

their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

"Tenth. The willful failure or refusal of any carrier, its officers or agents to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000 nor more than $20,000 or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any district attorney of the United States to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: *Provided,* That nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent." (USC Title 45, §152.)

Sec. 5. Section 5 of the Railway Labor Act is amended to read as follows:

"FUNCTIONS OF MEDIATION BOARD

"Sec. 5. First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

"(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

"(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

"The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

"In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 10 of this Act) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

"If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose."

* * * * * *

(USC Title 45, §155.)

Sec. 8. If any section, subsection, sentence, clause, or phrase of this Act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this Act. All Acts or parts of Acts inconsistent with the provisions of this Act are hereby repealed.* (USC Title 45, § 161.)

EXCERPTS FROM THE NORRIS-LAGUARDIA ACT

Act of March 23, 1932, Chap. 90, 47 Stat. 70.

AN ACT

To amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this Act; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act. (USC Title 29, §101.)

* * * * * *

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* The following is Section 11 of the Railway Labor Act as enacted May 20, 1926 (44 Stat. 587):

> "If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act, and the application of such provision to other persons or circumstances, shall not be affected thereby."

The foregoing is the separability provision quoted by the Circuit Court of Appeals (R. 332). The Code of the Laws of the United States of America, 1934 edition, treats this provision as superseded by Section 8 of the 1934 Act.

Sec. 4. No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

* * * * * *

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

* * * * * *

(USC Title 29, §104.)

Sec. 6. No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof. (USC Title 29, §106.)

Sec. 7. No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization mak-

ing the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

* * * * * *

(USC Title 29, §107.)

Sec. 9. No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the Court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided herein. (USC Title 29, §109.)

* * * * * *

Sec. 13. When used in this Act, and for the purposes of this Act—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or association of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as hereinafter defined) of "persons participating or interested" therein (as hereinafter defined).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if re-

lief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

* * * * * *

(USC Title 29, §113.)

EXCERPT FROM REPORT FROM THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE TO ACCOMPANY H. R. 9861, HOUSE OF REPRESENTATIVES, 73RD CONGRESS, SECOND SESSION, REPORT NO. 1944.

ANALYSIS OF THE BILL

(Section 2)

1. The bill does not introduce any new principles into the existing Railway Labor Act, but it is designed to amend that act in order to correct the defects which have become evident as a result of 8 years of experience. It does not change the methods of conference, mediation, and voluntary arbitration to settle major disputes over wages and working conditions, which are provided in the Railway Labor Act of 1926, now in effect.

2. It provides that the employees shall be free to join any labor union of their choice and likewise be free to refrain from joining any union if that be their desire and forbids interference by the carriers' officers with the exercise of said rights.

3. While providing that labor unions shall be free from employer influence and control, it does not give preference to any particular union or class of unions.

4. Machinery is provided for the taking of a secret ballot to enable the Board of Mediation to determine what representatives the employees desire to have negotiate for them with the managements of the carriers in matters affecting their wages and working conditions.

5. It forbids the use of the carriers' funds to maintain, aid, or control the labor organizations of the employees and specifically prohibits carrier managements from requiring employees to sign "yellow-dog contracts" requiring them to join company unions.

6. The Railway Labor Act of 1926, now in effect, provides that representatives of the employees, for the purpose of collective bargaining, shall be selected without interference, influence, or coercion by railway management, but it does not provide the machinery necessary to determine who are to be such representatives. These rights of the employees under the present act are denied by railway managements by their disputing the authority of the freely chosen representatives of the employees to represent them. A considerable number of railway managements maintain company unions, under the control of the officers of the carriers, and pay the salary of the employees' representatives, a practice that is clearly contrary to the purpose of the present Railway Labor Act, but it is difficult to prevent it because the act does not carry specific language in respect to that matter. This bill is designed to correct that defect.

RESPONDENT'S BRIEF

FILE COPY

JAN
CHARLES

IN THE

Supreme Court of the United States

October Term, 1936

No. 324

THE VIRGINIAN RAILWAY COMPANY,

Petitioner,

vs.

SYSTEM FEDERATION NO. 40, RAILWAY EMPLOYEES DEPARTMENT OF THE AMERICAN FEDERATION OF LABOR, ETC., ET AL.,

Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit

BRIEF OF RESPONDENTS

FRANK L. MULHOLLAND,
1441-49 Nicholas Bldg., Toledo, Ohio,
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S. M. BRANDT,
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Counsel for Respondents.

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IN THE

Supreme Court of the United States

October Term, 1936

No. 324

THE VIRGINIAN RAILWAY COMPANY,

Petitioner,

vs.

SYSTEM FEDERATION NO. 40, RAILWAY EMPLOYEES DEPARTMENT OF THE AMERICAN FEDERATION OF LABOR, ETC., ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENTS

BASIS OF THE ACTION

This case comes before this court on a writ of *certiorari* to review a decision of the United States Circuit Court of Appeals for the Fourth Circuit (84 Fed. 2d 641, R. 311), affirming a decision of the District Court of the

United States for the Eastern District of Virginia (11 Fed. Supp. 621, R. 254). This case is an action in equity, arising under the Railway Labor Act, a statute of the United States originally enacted in 1926 and amended in 1934. The interpretation, application, and constitutional validity of this statute have been called in question by the petitioner. A further question has been raised as to the relation between the provisions of this act and those of another federal statute, the Norris LaGuardia, or Anti Injunction, Act. (Relevant portions of both the above statutes will be found in Appendices I and II, respectively, to this brief.)

THE PARTIES

The parties to this proceeding are the Virginian Railway Company, petitioner, and System Federation No. 40 of the Railway Employees' Department of the American Federation of Labor, (hereinaffer referred to as the "Federation") and certain individual officers of the Federation, respondents.

THE FACTS

The facts out of which this action grew are as follows:

Prior to July 1, 1922, those employees of the Virginian Railway Company working in its shops (Mechanical Department employees) were represented by the Federation for the purposes of collective bargaining. On that day a strike was called among the said employees. This strike was unsuccessful, and the strikers were largely replaced by men newly hired for that purpose.

On July 3, 1922, the United States Railroad Labor Board, a tribunal organized pursuant to the provisions of the Transportation Act of 1920, adopted a resolution calling upon employees of carriers to organize themselves into associations for the purpose of collective bargaining. In purported compliance with this resolution, the petitioner caused to be formed among its Mechanical Department employees an organization known as the Mechanical Department Association of the Virginian Railway (hereinafter referred to as the "Association"). With regard to this Association, the District Court in its opinion commented as follows:

> "With respect to the formation and activities of this Association the testimony reveals that no employee knew just how or when he became a member thereof, that no dues were ever assessed or paid by members, that meetings were held only once every two years and then apparently for the sole purpose of electing officers and committeemen, that the notices of the elections were sent out from an office of the railway, that all expense incident to the organization and maintenance of the Association was defrayed by the Railway, and that no substantial grievances were ever taken up by the Association representatives with the Railway." (R. 256).

This conclusion was amply supported by the testimony given at the trial. No less than ten witnesses testified as to the lack of formal membership applications, meetings, and dues in this organization (R. 81, 103, 104, 105, 110, 118, 122, 129, 131, 133, 174). The carrier printed the ballots used in the biennial elections of the Association (R. 81, 112), supplied meeting places where these elections could be held (R. 104) and sent out notices rela-

tive to association affairs through the company mail (R. 104, 112), all at its own expense. In addition it supplied cash to the Association to the extent of $100.00 per year (R. 105). As an instrumentality for representing employees in the adjustment of their grievances, the Association was entirely ineffective (R. 113). The membership of the Association was maintained largely through the efforts of the carrier, inasmuch as employees working for the railroad were not permitted to affiliate with any other labor organization (R. 89, 105, 127).

The Association continued in existence without opposition until 1927, at which time the Railway Employees' Department of the American Federation of Labor made an effort to organize the mechanical department employees into unions affiliated with itself. This effort continued until the time of the filing of this action. In 1934 the president of the Railway Employees' Department of the American Federation of Labor claimed the right to represent the mechanical department employees by the choice of a majority of them. The claim so made by him was disputed by the Association and by the carrier. Accordingly the services of the Board of Mediation, as organized under the Railway Labor Act of 1926, were invoked in an attempt to settle this dispute. The investigations of this board developed the fact that the Federation had secured signed authorizations from a substantial number of the employees affected, but not from a majority. No further investigations were made by this board and the dispute remained in *status quo* until after the passage of certain amendments to the Railway Labor Act on June 21, 1934. Shortly after that date the matter was referred to the new National Mediation Board, organized

pursuant to the amended act. Section 2, paragraph ninth,[1] of this act was invoked.

The National Mediation Board took jurisdiction of this dispute, and decided to hold an election among the mechanical department employees, which was done. The District Court found that "all the testimony on that subject shows that the election was fairly and honestly conducted, and that everyone entitled to vote had full opportunity to exercise that right without hindrance or interference by the Federation or anyone connected with it." The election resulted as follows:

	Eligible	For Federation	For Association
Sheet Metal Workers	52	37	9
Carmen and Coach Cleaners	266	98	20
Machinists	267	141	41
Blacksmiths	46	22	8
Electrical Workers	114	80	11
Boilermakers	79	51	9
Totals	824	429	98

[1] The paragraph in question reads in part as follows:

"If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party in the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. * * * In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, * * *."

The National Mediation Board, on September 13, 1934, certified System Federation No. 40 as the representative of each of these crafts. (For full copy of the certification by the National Mediation Board, see R. 13 to 15, inclusive.)

During the course of these events, the carrier in many ways exerted its influence upon its mechanical department employees in an effort to interfere with their choice of representatives and coerce them to the end that they would refrain from becoming members of the various unions affiliated with the Federation, or select the Federation as their representative.

> "The court doth further find from the evidence that by means of personal interviews, posted bulletins and by the circulation of a pamphlet calling the attention of its Mechanical Department employees to the disadvantages attendant upon membership in a standard labor organization and the advantages of a company union, the defendent sought to influence its Mechanical Department employees against any participation in or association with a standard labor organization and thereby to maintain a mere nominal association or union supported wholly by the defendant, and in the further effort to prevent its mechanical department employees from exercising their free and untrammeled right to choose their own representative; * * *." (R. 281, from the 4th finding of fact of the District Court.)

The pamphlet mentioned was the so-called Sasser statement, issued by the Superintendent of Motive Power of the Virginian Railway (J. W. Sasser), and distributed through the company's foremen and the officers of the Association to the Mechanical Department employees. (R. 69.) This statement was issued on June 11, 1934,

while the representation dispute above mentioned was pending, and while a mediator of the Board of Mediation was on the property of this carrier attempting to adjust the differences between the parties. The complete statement is found on pages 197 to 201 of the Record. The District Court said of it:

> "* * * * I hardly think that any one can read with an open mind the Sasser statement referred to and quoted at length above without fairly concluding that it was printed and circulated to 'use the authority and power' of the railway 'to induce action' by the members of the craft 'in derogation of what the statute calls "self-organization" '. That it probably and naturally had the intended effect on many of those to whom it was delivered is no more than a reasonable inference to be drawn from the situation and power of the author over those to whom it was addressed. * * *"

The personal interviews to which the court referred consisted of statements by foremen of the carrier, advising employees to vote against the Federation if they wished to continue in their employment, and in further statements to the effect that to remain away from the polling places would amount to a vote for the company. (R. 84, 108, 109, 116, and 117.)

The court in reaching the conclusion set up in its fourth finding of fact, carefully weighed this evidence as is shown from the discussion of it in the opinion (R. 264). After the National Mediation Board had issued its certification, certifying the Federation as the representative of the Mechanical Department employees, the carrier refused to recognize it or to treat with the Federation as such representative. Instead it "by and through its officers, agents and servants, undertook by means of the

circulation of a petition or petitions addressed to the National Mediation Board, to have the certification of the National Mediation Board aforesaid altered, changed or revoked so as to deprive its Mechanical Department employees of the right to representation by said System Federation No. 40, Railway Employees' Department of the American Federation of Labor, so designated as aforesaid, and thereafter did cause to be organized the Independent Shop Crafts Association by individual mechanical department employees by circulating or causing to be circulated applications for membership in said Independent Shop Crafts Association notwithstanding the certification as aforesaid by the National Mediation Board of said System Federation No. 40, Railway Employees' Department of the American Federation of Labor, as the authorized representative of its Mechanical Department employees." (R. 281, from 4th finding of fact of the District Court.)

This Independent Shop Crafts Association (referred to herein as the Independent) was ostensibly formed by H. C. Hearne, an employee of the carrier. The story of its organization appears in the cross examination of Hearne, who was a witness in the court below. (Pages 169 to 175 of the Record.)

The court analyzed this testimony in the opinion and stated the following as its conclusion:

> " * * * The indications from his action and testimony are strongly to the effect that Hearne in organizing the Independent was not in good faith representing the crafts but was in fact acting at the behest of the railway. And upon the whole case the evidence indicates unmistakably that the real contestants in the election were the Federation

and the Railway, that such is the situation in the controversy involved in this litigation, and that the parts played by the Association and the Independent in those contests have been very largely that of mere figureheads." (R. 265, 266.)

Upon the failure of the carrier to recognize the certification of the National Mediation Board and to treat with the Federation, and upon its persisting in its long-time policy of building up a company-controlled labor organization among its Mechanical Department employees, the appellees filed this action in the District Court, seeking injunctive relief in two respects:

FIRST: They sought a prohibitory injunction restraining the carrier from further acts of interference, influence or coercion toward the employees in question. The prayer for this relief was predicated upon Section 2, Third, of the Railway Labor Act.[1]

SECOND: They sought a mandatory injunction compelling the carrier to treat with the Federation as the representative of these employees as required by Section 2, paragraph ninth of this same act, wherein it is provided that "upon receipt of such certification the carrier shall treat with the representative so certified as the repre-

[1] Said section reads as follows:

"Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier."

sentative of the craft or class for the purposes of this act."

The relief prayed for was granted in both respects by the lower court. In reaching this result, the District Court, as we have noted, entered into an exhaustive survey of the evidence and made extensive findings as to the facts. In these findings the Circuit Court of Appeals expressly concurred, saying:

> "The judge below heard the case fully and carefully and correctly analyzed the evidence in his opinion reported in 11 Fed. Supp. 621, to which we refer as a sufficient statement of the facts." (R. 313).

And further:

> "A careful study of the evidence convinces us that these findings are amply supported." (R. 314.)

It is the settled rule of this court that where two lower courts have concurred in their judgments as to the facts of a case, the Supreme Court will not disturb their findings unless palpable error or manifest injustice has been done.

Dun vs. Lumberman's Credit Assn., 209 U. S. 20.

Geddes vs. Anaconda Copper Min. Co., 254 U. S. 590.

Charleston, South Carolina, Mining & Mfg. Co. vs. United States, 273 U. S. 220.

Texas & N. O. R. R. Co. vs. Brotherhood, etc., 281 U. S. 548.

Peck Mfg. Co. vs. General Motors Corp, 57 Sup. Ct. Rep. Advance Sheets, p. 1.

As pointed out above, the findings of the lower courts have a substantial basis in the evidence produced at trial. No palpable error or manifest injustice has therefore been done to the petitioner. Accordingly no issue of fact can properly be injected into the proceedings in this case had before this court.

SUMMARY STATEMENT OF ISSUES INVOLVED AND RESPONDENTS' POSITION AS TO EACH

It will be seen from the foregoing statement of facts that the original controversy in this case was one between two groups of the mechanical department employees of the petitioning carrier. The one group desired and still desires to be represented for the purpose of collective bargaining by the respondent Federation. The other group expressed an apparent desire for representation by the now defunct Association, a company formed and dominated figurehead, maintained in existence by acts of influence, interference and coercion on the part of the petitioner.

Into this controversy, which, according to the terms and spirit of the Railway Labor Act of 1926 as well as the amendments of 1934 thereto, was no matter of legitimate concern to it, the petitioner thrust itself in the capacity of an active participant. It raises certain questions in this court concerning the Railway Labor Act:

ISSUE NO. I. Section 2, Ninth, of the act provides that in case of a dispute as to who shall represent any class or craft of employees, the National Mediation Board shall have authority to ascertain the position of the em-

ployees in the matter and certify the same to the carrier. This paragraph further provides that:

> "Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act." (For the full text of this paragraph see Appendix I, pp. 111-112.)

QUESTION: Does Section 2, Ninth, impose upon a carrier an obligation to "treat" which is enforceable in a court of equity?

RESPONDENTS' POSITION: (a) The legislative history of this statute, the specific evil at which this paragraph was aimed, and the enforceable nature of other provisions of the act all indicate that it was the intent of Congress to make Section 2, Ninth, enforceable by process.

(b) The obligation so imposed is sufficiently definite and concrete as to be susceptible of enforcement by injunction.

ISSUE NO. II. Section 2, Ninth, of the act as above construed and as applied to the negotiation of collective bargaining agreements does not compel any carrier to enter into any agreement with any representative. It does, however, compel it to negotiate with the certified representative and with it only.

QUESTION: Does Section 2, Ninth, therefore, take the liberty of contract of the petitioner without due process of law?

RESPONDENTS' POSITION: Any impairment of the petitioner's liberty resulting from the provisions of this paragraph constitutes a phase of a reasonable regulation of interstate commerce, and hence conforms to the requirement of due process of law.

ISSUE NO. III. The Railway Labor Act applies to all employees of carriers according to the definition of employees made in the orders of the Interstate Commerce Commission. Specifically, as applied to this case, the Act includes within its scope "back shop" employees, or those engaged in making repairs of a permanent nature on the operating equipment of the carrier.

QUESTION: Is the Railway Labor Act as a whole, therefore, a valid exercise of the power of Congress to regulate Interstate Commerce?

RESPONDENTS' POSITION: (a) The congressional power extends to the regulation of all matters which directly interrupt or interfere with the free flow of interstate commerce. The purpose of this act is to prevent such interruptions growing out of disputes between carriers and employees, which interruptions are likely to arise from disputes involving any group of employees whether directly engaged in interstate commerce or not.

(b) The relationships between a carrier and its employees who are directly engaged in interstate commerce and its employees who are not so engaged are so commingled in practice as to render the regulation of the former impracticable unless the regulation of the latter is included.

ISSUE NO. IV. Section 2, paragraph Fourth of the Railway Labor Act contains the following provision:

> "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this act."

In case there is a dispute as to who is the representative of any craft or class, the National Mediation Board is authorized to hold an election and determine the matter. (Section 2, Ninth.) The results of the election held in this case are stated on page 5. All of the statistics there noted were recited by the board in its certification except the number of eligible voters in each craft. The board did not recite in terms that the Federation was the choice of a majority, but did certify it as the chosen representative of the crafts in question. The petitioner treats this situation as presenting one issue to the court (petitioner's brief page 15, No. IV). It is submitted that there are two points, factually related but legally distinct, the one involving the interpretation of the act, the other the validity of the certification.

QUESTIONS: (a) *Does the language of Section 2, Fourth, require that a majority of the eligibles in any craft or class of employees must vote in favor of a given representative in order to constitute a valid selection, or is a majority of those voting sufficient?*

(b) *Is it necessary for the National Mediation Board to state in its certification all of the evidence upon which its finding of fact is based, and to state in terms that a majority has voted for a certain representative?*

RESPONDENTS' POSITION: (a) If the provision of Section 2, Fourth, relating to the majority of a craft or class is applicable to elections conducted by the National Mediation Board, this provision contemplates a majority of those voting in a representation election, at least when a majority of the eligible voters participated in the election by casting ballots.

(b) The certification of the National Mediation Board was a complete and proper finding of those facts the determination of which was entrusted to it by the statute. Such a certification need not contain a statement of the evidence upon which that finding is based.

ISSUE NO. V. (This issue is a combined statement of petitioner's Issues Nos. V and VI.) The Norris-LaGuardia Act (for the provisions of which see Appendix II, p. 121) is a statute limiting the power of federal courts to grant injunctions in cases involving labor disputes. Section 4(e) of the Norris-LaGuardia Act provides that an injunction shall not issue to restrain the commission of acts amounting to a "giving of publicity to the existence of, or the facts involved in, any labor dispute * * *." Section 9 provides that "every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill * * *." Petitioner asserts that this section prohibits the granting of mandatory injunctions. Sections 6 and 7 provide in effect that no person, association, or organization involved in a labor dispute shall be held liable for the acts of agents, except upon clear proof of participation, authorization or ratification by them.

QUESTION: Is the power of the court to act in this case restricted by the Norris-LaGuardia Act or any of its provisions?

RESPONDENTS' POSITION: (a) General application of the Norris-LaGuardia Act.

1. This Act was intended to apply only to situations involving strikes or lockouts.

2. The means of enforcement contemplated by the Railway Labor Act for rights created by that Act take precedence over any general limitations on the granting of equitable relief set up by the Norris-LaGuardia Act inasmuch as the Railway Labor Act is a subsequently enacted statute.

(b) Application of specific provisions of the Norris-LaGuardia Act.

1. Section 9, properly interpreted, does not forbid all mandatory injunctions in cases involving labor disputes as contended by the petitioner.

2. Section 4(e) is not applicable because the acts of the petitioners cannot properly be considered as the giving of publicity, and because the injunction granted by the District Court is not directed to any act of the petitioner whose object is mere publicity, but only to those acts amounting to influence, interference or coercion.

3. Sections 6 and 7 are not applicable because the petitioner is not an "association or organization" within the meaning of the act, and because the findings of the District Court establish that the petitioner itself performed the unlawful acts which are the basis of the injunction. Authorization or ratification by it, therefore, may be considered as proved.

ARGUMENT

I. SECTION 2, NINTH, OF THE RAILWAY LABOR ACT IMPOSES AN OBLIGATION TO TREAT WHICH IS ENFORCEABLE IN A COURT OF EQUITY.

a. It Was the Intention of Congress That Section 2, Ninth, Should Be Enforceable.

Such portions of Section 2, paragraph Ninth, of the Railway Labor Act as are relevant to this portion of the discussion are reproduced in the footnote below for the convenience of the court.[1]

The question is raised as to whether the obligation to "treat" created by the last sentence in the quoted portion of Section 2, Ninth, is to be interpreted as creating an obligation enforceable by process.

Any statute is an expression of legislative intent. The judicial process of interpretation is a determination of the nature of that intent. In making such determination, courts are not limited to an examination of the specific phrase whose meaning has been called into question,

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[1] "Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. *Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act.*" (Emphasis ours.) (U. S. C. Title 45, Sec, 152, para. Ninth.)

nor necessarily to the individual statute of which that phrase is a part. As the phrase must be considered in relation to its context, so must the statute be considered in relation to other statutes dealing with the same general subject matter which may have been amended, supplemented, or supplanted by it. In no other way can an accurate appraisement be made of the basic legislative purpose. An understanding of this purpose supplies the plan of the statutory mosaic and gives meaning to its component parts. The Railway Labor Act is the current expression by Congress of such a basic purpose.

It has been the experience of the past that interstate commerce is subject to delays and interruptions which have their source in disputes between carriers and their employees, and which result in losses to both the participants and the members of the public. Congress has sought to minimize or eliminate these losses through a long course of legislation whose basic purpose has been and is to provide the means whereby these labor disputes may be settled before they attain proportions sufficient to jeopardize the carrying on of the commercial process.

The statutory plan throughout this course of legislation has been to encourage the adjustment of disputes in conferences between the parties and to provide for the formation of special tribunals to assist in such adjustments if private negotiations fail.

The various statutes dealing with this matter have naturally not been identical in their details. As one means of carrying out the basic purpose has been found ineffective, another has been substituted, but the purpose itself has not been changed, nor has the general plan for carrying it into effect been fundamentally altered.

This general pattern, running as it does through a whole series of legislative enactments, constitutes a valuable addition to the sources upon which the court is privileged to draw in interpreting any provision of the contemporary statute.

Recent legislative consideration of the problem of the relations between carriers and employees began in 1920 with the enactment of the Transportation Act of that year. It will be remembered that during the World War the carriers of this country were taken over by the federal government for management. The Transportation Act of 1920 was enacted at the time of the termination of federal control when the carriers were being returned to the hands of their respective private managements. Title III of this Act related to labor relations between these carriers and their employees. It contained in the first place a statement of general duties, the carrying out of which would, it was believed, make for amicable relations between the parties.(1) In addition, the statute provided for the formation of a special tribunal known as the United States Railroad Labor Board, whose duty it was

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(1) "It shall be the duty of all carriers and their officers, employees, and agents to exert every reasonable effort and adopt every available means to avoid any interruption to the operation of any carrier growing out of any dispute between the carrier and the employees or subordinate officials thereof. All such disputes shall be considered and, if possible, decided in conference between representatives designated and authorized so to confer by the carriers, or the employees or subordinate officials thereof, directly interested in the dispute. If any dispute is not decided in such conference, it shall be referred by the parties thereto to the board which under the provisions of this title is authorized to hear and decide such dispute." Transportation Act of 1920, Title III, Section 301; Fed. Stat. Ann., 1920 Supp., pp. 87, 88, 41 Stat. L. 469.

to give consideration to disputes between carriers and employees.

This statute came before this court for interpretation in two cases. Both grew out of the same labor controversy between the Pennsylvania Railroad Company and its shop craft employees. The first case was that of *Pennsylvania Railroad Company vs. United States Railroad Labor Board*, 261 U. S. 72. The action was one seeking to enjoin the board from publishing a decision adverse to the carrier. This court decided that an injunction had been properly refused. It held that the decisions of the board were unenforceable by legal process and hence that their publication was not enjoinable. The court said:

> "It is evident from a review of title III of the Transportation Act of February 28, 1920, that Congress deems it of the highest public interest to prevent the interruption of interstate commerce by labor disputes and strikes, and that its plan is to encourage settlement without strikes, first, by conference between the parties; failing that, by reference to adjustment boards of the parties' own choosing; and, if this is ineffective, by a full hearing before a national board appointed by the President, upon which are an equal number of representatives of the carrier group, the labor group, and the public.
>
> "The decisions of the Labor Board are not to be enforced by process. The only sanction of its decision is to be the force of public opinion invoked by the fairness of a full hearing, the intrinsic justice of the conclusion, strengthened by the official prestige of the board, and the full publication of the violation of such decision by any party to the proceeding. The evident thought of Congress in these provisions is that the economic interest of every member of the public in the undisturbed

flow of interstate commerce, and the acute inconvenience to which all must be subjected by an interruption caused by a serious and widespread labor dispute, fastens public attention closely on all the circumstances of the controversy, and arouses public criticism of the side thought to be at fault."[1] (pp. 79-80).

The second Pennsylvania case was that of *Pennsylvania System vs. Pennsylvania Railroad Company*, 267 U. S., 203. The question here did not relate to the enforceability of a decision of the Labor Board, but to the enforceability of the general duties prescribed by Section 301 of the Act (see footnote page 19). The plaintiff in the court below had sought to base an action for a mandatory injunction upon an alleged breach of the duties set up in this section. While the question presented to the court was not identical with that involved in the first

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[1]The enforcement provisions of this statute to which the court referred in the above quotation may be found in Section 307, paragraph (c), and in Section 313 of the Act, the relevant portions of which read as follows:

"All decisions of the Labor Board shall be entered upon the records of the board and copies thereof, together with such statement of facts bearing thereon as the board may deem proper, shall be immediately communicated to the parties to the dispute, the President, each Adjustment Board, and the Commission, and shall be given further publicity in such manner as the Labor Board may determine." (Sec. 307-c, 41 Stat. L. 470.)

"The Labor Board, in case it has reason to believe that any decision of the Labor Board or of an Adjustment Board is violated by any carrier, or employee or subordinate official, or organization thereof, may upon its own motion after due notice and hearing to all persons directly interested in such violation, determine whether in its opinion such violation has occurred and make public its decision in such manner as it may determine." (Sec. 313, 41 Stat. L. 473.)

Pennsylvania case, the court considered its ruling in the first case conclusive upon it in the second, and quoted extensively from the opinion there rendered. It was accordingly held that Section 301 of the Transportation Act did not set up any duties enforceable by process. The court so held even though the statute did not make the enforcement provisions which were applicable to decisions of the Labor Board also applicable specifically to the duties prescribed in Section 301. It was concluded that the mere existence of these enforcement provisions, invoking as they did the force of public opinion only as the enforcing medium for one portion of the statute argued that other portions of the same statute were not intended to be enforced by legal process.

The Pennsylvania cases thus establish no general rule of statutory construction to the effect that any duties between carriers and employees set up by any act of Congress are not intended to be legally enforceable. The decisions in both cases are based squarely upon the somewhat unusual enforcement provisions contained in the Transportation Act. The only principle of general application which can be drawn from the opinion is that a court may look to sections of a statute other than the one directly before it in order to determine the legislative intent with regard to the legal enforceability of any obligations imposed. With this proposition we heartily concur. As will be noted later, however, the application of this rule to the Railway Labor Act leads to a conclusion in the matter of legislative intent as to the enforceability of general duties which is diametrically opposed to that reached in the above case.

The Congressional hope that the "economic interest"

of the public would prevent the development of a "serious and widespread labor dispute" was doomed to disappointment. Either the members of the public were apathetic, or the disputants showed less respect than contemplated for public opinion. In any event, the act failed in its purpose, the Railroad Labor Board lost caste, its decisions were openly flouted by employers and employees alike, and in short the whole enforcement machinery of the act broke down.

These facts gave rise to a dangerous situation of which carriers and employees were alike aware. After a series of conferences of the leaders on both sides, it was decided to abandon the Transportation Act entirely, and to request the passage of a new law by Congress. The result was the enactment of the Railway Labor Act of 1926, which was sponsored jointly by the carriers and by the railroad labor unions.

The new statute preserved some of the features of the old, but added a number of new ones. Title III, Section 301, of the Transportation Act was substantially reenacted. The United States Railroad Labor Board, however, was abolished, and there was substituted in its place a tribunal known as the National Board of Mediation, whose function was not to decide but to endeavor to mediate disputes. Minor disputes, relating to grievances or disagreements concerning the application or interpretation of existing agreements between individual carriers and their employees could be submitted to boards of adjustment set up on the properties of carriers or groups of carriers and composed of representatives of employees and carriers in equal numbers. The establishment of such boards, however, was made permissive and not manda-

tory. The act further provided for voluntary arbitration of disputes, the awards of arbiters, however, to be legally enforceable. It provided also for the creation of emergency boards to investigate and report upon serious controversies, and in case such a board was created required the parties to preserve the *status quo* for at least thirty days thereafter. In addition it contained this highly significant provision:

> "Representatives, for the purposes of this chapter, shall be designated by the respective parties in such manner as may be provided in their corporate organization or unincorporated association, or by other means of collective action, without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other." U. S. C. A. Title 45, Ch. 8, Art. 152, Third. 44 Stat. 577.

This statute was before this oourt for interpretation in the case of *Texas and New Orleans Railroad Company vs. Brotherhood of Railway and Steamship Clerks, etc.*, 281 U. S., 548. It was argued that this provision was not intended to set up an enforceable obligation because the act contained no specific provision for its enforcement. The Pennsylvania cases were cited in support of this contention. This court, however, did not sanction such a position, saying:

> "It is at once to be observed that Congress was not content with the general declaration of the duty of carriers and employees to make every reasonable effort to enter into and maintain agreements concerning rates of pay, rules and working conditions, and to settle disputes with all expedition in conference between authorized representatives, but added this distinct prohibition against coercive measures. *This addition cannot be treated as su-*

perfluous or insignificant, or as intended to be without effect. * * *" (Pp. 567, 568.)

"In reaching a conclusion as to the intent of Congress, *the importance of the prohibition in its relation to the plan devised by the act must have appropriate consideration.* Freedom of choice in the selection of representatives on each side of the dispute is the essential foundation of the statutory scheme. * * *" (Pp. 568, 569.)

"*The absence of penalty is not controlling.* The creation of a legal right by language suitable to that end does not require for its effectiveness the imposition of statutory penalties. Many rights are enforced for which no statutory penalties are provided. In the case of the statute in question, there is an absence of penalty, in the sense of specially prescribed punishment, with respect to the arbitral awards and the prohibition of change in conditions pending the investigation and report of an emergency board, but in each instance a legal obligation is created and *the statutory requirements are susceptible of enforcement by proceedings appropriate to each.* The same is true of the prohibition of interference or coercion in connection with the choice of representatives. The right is created and the remedy exists. * * *" (Pp. 569, 570.) (Emphasis ours.)

The matters which influenced the court in its decision are apparent from the above excerpts from the opinion. They are:

1. The basic congressional plan of regulation must be considered in interpreting any portion of a statute enacted in furtherance of that plan.

2. Where one statute contains a general statement of duties and a subsequent statute having the same basic purpose adds provisions which can be interpreted as positive commands, the addition cannot have been intended to be without legal effect.

3. The absence of express provisions for penalties is not controlling.

4. The fact that obligations created by sections of a statute other than the one in question are expressly made enforceable is persuasive of the existence of an intention to make all obligations created by it likewise enforceable.

As certain carriers were able to avoid the manifest intention of Congress as expressed in the Transportation Act of 1920, so were certain of them able to avoid compliance with the same general intent as expressed in the Act of 1926. The history of the Virginian Railroad and its relation with its company unions found by the lower court to be mere "figureheads," namely, the Association and later the Independent, is typical of this situation. The method adopted was as follows: A company union was organized and entered into an "agreement" with the carrier. Any claim of any other organization of a right to represent the employees involved was met by a protest from the figurehead union. The carrier then stated that in view of the dispute, it must continue to recognize the company union until the question of representation was settled. Under the Act of 1926 the only recourse of a party was to invoke the services of the National Board of Mediation, as was done in this case. This board, as organized under the 1926 statute, had, it will be remembered, no authority to *decide* the dispute. It could only *mediate*. Mediation cannot be successful where any party enters the proceedings with the fixed determination to yield nothing. Thus the whole matter of representation could be successfully stalemated by a carrier through simply refusing to recognize the claim of any other than its company union to represent its employees.

This situation of stalemate existed on the Virginian Railroad when the amended Railway Labor Act of 1934 was passed.

The existence of this and similar situations was called to the attention of the Congressional committees which investigated the bill prior to its passage.[1]

That the Congress was acting with full recognition of the existing conditions and with intent to remedy them, appears from the report of the House Committee:

> "The Railway Labor Act of 1926, now in effect, provides that representatives of the employees, for

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[1] In his testimony before the Committee on Interstate and Foreign Commerce of the House of Representatives, Mr. George M. Harrison, appearing on behalf of twenty-one railroad labor organizations, made the following statement:

> "The law did not go far enough, however, to assure that practice of management designed to defeat the hope expressed by the law would be prevented. And, as a result of that today we have a situation in our industry where a reasonably large number of railway employees have been denied the right to exercise their free choice in the selection of representatives or to have the choice of the employees finally and definitely disclosed.
>
> "So, this bill seeks to supply that deficiency in the Railway Labor Act in respect to that matter and I might best give the general experience, by citing a typical example of that situation today:
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> "The employees on a particular railroad will wish to affiliate with one of the standard railroad labor organizations. After they take membership and authorize the standard organization to represent them, then a formal request is filed with the railway management that the designated organization has been authorized by a majority of the employees involved to represent them in all matters affecting their wages and working conditions. The general reply from management is that 'We have an association on our property with which we have an agreement and we have no information that the employees have changed their minds about representation by that association.'
>
> "And, therefore, they generally decline to meet the rep-

the purpose of collective bargaining, shall be selected without interference, influence, or coercion by railway management, *but it does not provide the machinery necessary to determine who are to be such representatives.* These rights of the employees under the present act are denied by railway managements *by their disputing the authority of the freely chosen representatives of the employees to represent them.* A considerable number of railway managements maintain company unions, under the control of the officers of the carriers, and pay the salary of the employees' representatives, a practice that is contrary to the purpose of the present Railway Labor Act, but it is difficult to prevent it because the act does not carry specific language in respect to that matter. *This bill is designed to correct that defect."* (Emphasis ours).

(The above excerpt from the committee report was quoted by the Circuit Court of Appeals below in its opinion. See R. 320.)

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resentatives of the organization which the employees have subsequently designated to speak for them.

"The next move then is to take that controversy to the United States Board of Mediation and a mediator is generally assigned in an effort to persuade management to recognize the true representatives of the employees. Generally in those proceedings a question comes up as to who shall vote in the election to determine the representatives and, most generally, that question is raised by the opposing association or representatives of management, for one, and only one purpose, of preventing a determination of that issue.

"We have a situation where the men covered by an agreement are the ones that are involved, the management will seek to vote a large number of men that are not covered by the contract and are not involved in the controversy, and as a result of that you get a situation where you cannot progress to a decision in the interest of the employees, because the next move under the present law is a proposal to arbitrate, and that is entirely voluntary, and either side may decline, and generally when they want to maintain the association and prevent the establishment of a standard organization, they decline to arbitrate the controversy, and

Considering the above mentioned three statutes together, the course of historical development is plain. Throughout Congress has been concerned with the possibility that the flow of interstate commerce might be interrupted by labor disputes with resulting injury both to the disputants and to the general public. In its first attempt to remedy this situation, it sought to express general principles relating to the elimination or adjustment of such disputes. It provided the machinery by which their elimination or adjustment could be obtained. Resort to this machinery was by the Transportation Act, made entirely voluntary, and the enforcement of decisions was left to the sense of propriety of the parties, and to an

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as a result the management goes ahead and continues to deal with representatives whom the employees have repudiated and would repudiate through the medium of a secret ballot if they could have that opportunity.

"So, this Act is designed to take care of that situation by providing that, if any controversy arises among the employees as to who are their representatives and that controversy is carried to the Board of Mediation, the Board of Mediation shall investigate that dispute and certify to the parties who are the legally designated representatives; or the Board of Mediation may take a secret ballot of the employees involved, and the Board shall be empowered to decide who shall participate in that ballot; or, if the Board does not desire to assume that duty because of the highly controversial nature of it, the Board may appoint three neutral persons who will decide who shall participate in the hearing, and then, based upon the decision made by the neutrals as to what individuals shall participate in the election, the Board of Mediation then proceeds to conduct the election and certify the results to the parties.

"When that is accomplished, the law makes it the duty of the carrier officers to deal with legally designated representatives of employees in the purpose of making and maintaining agreements." Hrgs. before Comm. on Int. and For. Commerce, 73rd Congress, H. R. 7650, pp. 78, 79.

aroused public opinion. This method of enforcement was found to be entirely inadequate.

The Act of 1926 was not an abandonment of the principles of the prior statute. It was merely a rephrazing of those principles with the addition of such legally enforceable obligations as were considered necessary to make them workable in practice.

The Act of 1934 represents a similar amplification of the Act of 1926. The principles are unchanged. Under the present act, the basic system for the elimination of disputes is still essentially through conferences between the parties. If these conferences are not successful, resort may be had to special tribunals. The specific mandatory or prohibitory features of the act are designed to facilitate the free operation of the whole system and to require that the parties observe certain necessary conditions precedent to its successful operation. The concern of Congress is that employers and employees shall deal together. In so dealing it is imperative that the representatives of the parties truly represent. The Act of 1926 provided that representatives be selected without interference, influence, or coercion of either party over the other. The Act of 1934 provides the means for ascertaining the employees' choice of representatives and compelling the carrier in all its dealings with its employees to treat with the true representative rather than with a mere figurehead. It is not reasonable to suppose that Congress, in an obvious attempt to strengthen the existing statute by specific provisions of compulsion, could have intended that compliance with these new provisions should be left to the voluntary action of the very parties whose refusal to comply with the spirit of the former law

made necessary the enactment of the provisions in question. It cannot have intended that this additional matter should be "treated as superfluous or insignificant" or as "without effect." "The importance of the prohibition in its relation to the plan devised by the act must have appropriate consideration." (*Texas & N. O. R. R. vs. Brotherhood, supra.*[1])

The historical development of the Railway Labor Act of 1934, therefore, is indicative of the intent of Congress to impose an enforceable legal obligation upon carriers to treat with the true representative of any craft or class of their employees certified as such by the National Mediation Board. The petitioner argues, however, that any interpretation of Section 2, Ninth, which construes it as imposing an enforceable obligation is anomalous. It

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[1]This whole matter is admirably summarized in the opinion of the Circuit Court of Appeals as follows:

> "The history of the Railway Labor Act shows that it was the purpose of Congress by the use of this language to impose a binding duty upon the carrier to recognize and treat with the representatives of the employees as certified by the Mediation Board. The Transportation Act of 1920 provided merely that the carriers and their employees should exert every reasonable effort to avoid interruption to the business of the carriers growing out of disputes with their employees, with provision that the parties should endeavor to settle such disputes, and if unable to do so, should refer them for arbitration to the appropriate board. * * *
>
> "The Railway Labor Act of 1926, 44 Stat. 577, created certain definite legal obligations enforceable by judicial proceedings for the purpose, among other things, of safeguarding the rights of the employees to bargain collectively through representatives of their own choosing without interference on the part of the carrier. *Texas & N. O. R. Co. vs. Railway Clerks,* 281 U. S. 548, 569. It did not, however, provide the machinery necessary for determining the representatives of the employees or for requiring the

asserts that carriers are not compelled to treat with representatives of employees where there is no dispute as to who those representatives are, and that accordingly Congress could not have intended to compel a carrier to treat only where a dispute has existed and the true representative determined by action of the National Mediation Board.

This argument is unsound for two reasons. In the first place, if any difference in treatment as between the two situations mentioned above is contemplated by the act, that difference would be entirely reasonable and understandable, and hence not anomalous. In the second place, the petitioner's argument is unsound because no difference in treatment is in fact contemplated by the act.

It must be remembered that Congress amended this statute to remedy a known and existing evil. As we have seen, its attention was specifically called to situations where carriers were avoiding any treating with the true

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carriers to recognize and deal with such representatives; and the Act of June 21, 1934, 48 Stat. 1185, amending the Railway Labor Act, was passed for the purpose of remedying this defect. * * *

"We think it clear that the Act of 1934 did more than express a pious hope on the part of Congress that the carriers would deal with the representatives which their employees might choose. In providing that 'the carrier shall treat with the representative so certified (by the Mediation Board) as the representative of the craft or class for the purposes of this Act,' it created a legal right on the part of the employees to have the carrier recognize and treat with their chosen representatives for the purposes of collective bargaining and a corresponding duty on the part of the carrier to recognize and treat with such representatives, so that the purposes of the Act might not be nullified by the carriers refusing to recognize a representative selected by its employees and certified as such by the Mediation Board. * * *" (R. pp. 319, 320, 321.)

representatives of employees through the subterfuge of fomenting and keeping in existence a representation dispute between a company union and the standard labor organization which the employees desired. This method appears to have been the usual procedure. In so far as the evidence presented to the Congressional committee demonstrated, no carrier was then refusing to treat with the true representatives of employees save under the cloak of a claimed representation dispute. Thus if it be true that Congress did not include in the act any compulsory provisions requiring carriers to "treat" where no such dispute existed, no conclusion can be drawn from that fact as to its intention with regard to the enforceability of such an obligation in situations where a dispute did exist. Mere failure to provide for the legal prohibition of possible ills does not disprove an intention to prohibit an existing evil. It is well established in this court that statutes must be construed in relation to the evils which they were designed to cure. (*Warner vs. Goltra,* 293 U. S., 155.)

On the other hand, however, the petitioner's argument is incorrect for the reason that the Railway Labor Act does impose compulsory obligations upon carriers to "treat" in some measure with the representatives of their employees whether a representation dispute exists or not. Petitioner's argument in this connection rests solely on the provisions of paragraphs First and Second of Section 2 of the act.[1]

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[1]"First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid

These paragraphs are copied substantially from the Railway Labor Act of 1926, which in turn copied them from Section 301 of the Transportation Act of 1920 (See footnote page 19). As a part of the 1920 Act, this court, in the second Pennsylvania case, decided that this language did not impose an enforceable obligation on the ground that it formed a part of a generally unenforceable statute. As adopted into the Railway Labor Act of 1926, it was also held unenforceable in the case of *Malone vs. Gardner,* 62 Fed. 2d 15, decided by the same United States Circuit Court of Appeals which decided the present case below. The petitioner asserts that this language as used in the Act of 1934 provides an unenforceable obligation under the familiar "copied statute" rule of interpretation. This rule, of course, is not absolute. That language which creates an unenforceable obligation when a part of a generally unenforceable statute retains its character when it becomes a part of an enforceable act is not an inevitable conclusion. However this may be, and regardless of the enforceability or otherwise of the provisions of Section 2, First and Second, there are other provisions of this statute which do create enforceable obligations upon *all carriers* to treat or confer with the representatives of their employees under certain circumstances.

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any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

"Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute." (Public Act No. 442, 73rd Congress, U. S. C. Title 45, Section 152.)

It will be noted that Section 2, Ninth, requires carriers to "treat" with the representatives of their employees "for the purposes of this act." We should consider, therefore, what are the purposes of the act, and what compulsion is placed upon *carriers generally* by other portions of the statute in relation to these purposes.

It is apparent that the purpose of any "treating" must be to adjust differences between the parties. The phrase "purposes of this act" accordingly must refer to the settlement of disputes between carriers and employees. Two types of disputes are contemplated by this statute, *i. e.*, those involving the making or changing of agreements concerning rules, rates of pay, or working conditions, and those involving local grievances or disputes concerning the interpretation or application of agreements already made.[1]

The system set up by the statute for all carriers regardless of whether a representation dispute exists or not, contemplates a measure of compulsion in the matter of treating with representatives of employees in the settlement of both types of differences.

For example, all carriers are required to post notices to the effect that all labor disputes of whatever nature

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[1] "Sec. 2. The purposes of the Act are: * * * (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions."

"will be handled in accordance with the requirements of this act."[1]

Separate lines of procedure are provided by the act for the handling of the two types of disputes above noted. Changes in agreements are to be made in accordance with Section 6. This section clearly contemplates that conferences be held by the parties.[2]

The obligations of this section are made criminally enforceable upon carriers by Section 2, paragraphs Seventh and Tenth.[3]

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[1]"Sec. 2. Eighth. Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this Act. * * *"

[2]"Sec. 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

[3]"Seventh. No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

"Tenth. The willful failure or refusal of any carrier, its officers or agents to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraphs of this section shall be a misdemeanor, * * *."

In view of these specific enforcement provisions, the intention of Congress is clear. The provisions of Section 6 of the act relating to conferences between the parties are certainly enforceable provisions. To this extent unquestionably Congress has imposed a legal obligation upon all carriers to "treat" with employee representatives.

The other type of case, *i. e.*, one arising out of grievances or out of the interpretation or application of agreements, is to be handled in a different manner. The parties, however, are again commanded to confer with regard to the matter. If conferences fail, then the dispute may be referred to the National Railroad Adjustment Board for determination.[1]

Either method of procedure as outlined by the statute

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[1] "Sec. 2. Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: * * *."

"Sec. 3. First. There is hereby established a Board, to be known as the 'National Railroad Adjustment Board,' the members of which shall be selected within thirty days after approval of this Act, and it is hereby provided: * * *

"(i) The disputes between an employee or group of employees and a carrier growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

results ultimately in the parties coming under definite legal obligations. Decisions of the National Railroad Adjustment Board may be enforced by definitely outlined procedure. Acts of the National Mediation Board are not thus enforceable, but a taking of jurisdiction by that board places the parties under a certain legal duty to maintain the *status quo* until its functions have been performed.

In the second Pennsylvania case, this court indicated that where a system for the settlement of disputes resulted finally in no enforceable obligation, the statement in the statute of general duties to be performed in the course of the adjustment process could not be intended to create a legal obligation. The converse of this statement is equally correct. Where the ultimate end of the statutory process is the undoubted creation of enforceable obligations, general statements of duty are given color by the proceedings to which they are related. Accordingly, there is specifically imposed upon all carriers an obligation to confer or treat with employee representatives "for the purposes of this act," *i. e.*, the adjusting of disputes between them.[1]

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[1] The number and nature of the definitely enforceable obligations created by the amended Railway Labor Act of 1934 were considered by the United States Circuit Court of Appeals in its opinion rendered in the case below:

> "It is true that the Act does not require agreement between the carrier and the representative of its employees; but the whole purpose of the Act is to set up machinery for the settlement of disputes by which disagreements resulting in strikes may be avoided, and it is essential to the working of this machinery that the carrier treat with the representative of the employees as contemplated by the Act. Thus, it is provided by Section 2 (second) thereof (48 Stat. 1187, 45 U.S.C.A. 152 (second)) that all disputes between

These factors give a somewhat different significance to the language of Section 2, paragraphs First and Second from that which they had in the Transportation Act of 1920, or in the Railway Labor Act of 1926. Whether the meaning of these two paragraphs in the present act is the same as it was in the former acts, or different, is im-

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a carrier and its employees shall be considered, and, if possible, decided in conference between representatives designated and authorized to confer. It is provided by Section 2 (sixth) (48 Stat. 1188, 45 U. S. C. A. 152 (sixth)) that, in case of a dispute arising out of grievances or the interpretation or application of agreements, it shall be the duty of the representatives of the carrier and of the employees, within ten days after the receipt of notice of a desire on the part of either party to confer with respect to such dispute, to fix a time and place for a conference. Section 6 (48 Stat. 1197, 45 U. S. C. A. 156) provides that carriers and representatives of employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules or working conditions, and shall agree upon the time and place for the beginning of conference between representatives of the parties interested in such intended changes within ten days after the receipt of the notice. Carriers are forbidden to change the rates of pay, rules or working conditions as embodied in agreements without giving the 30-day notice just referred to, except in cases where the agreements themselves provide for the change. 48 Stat. 1188, 45 U. S. C. A. 152 (seventh).

"If the conferences thus provided for do not result in the settlement of disputes, the Act has other provisions for their settlement which require action on the part of the representatives of the parties. Thus, either of the parties, which in the case of the employees means their representatives, may invoke the services of the Mediation Board if a dispute is not adjusted in conference, and there is provision for the preservation of the *status quo* for a thirty-day period in case the Mediation Board shall fail in bringing the parties to agreement or in securing an arbitration of grievances. 48 Stat. 1195, 45 U. S. C. A. 155. In case of agreement to arbitrate, the representative of the employees is to select one of the arbitrators if of a board of three,

material, as the obligation to confer is spelled out completely in other portions of the statute which were not copied from any source, and whose significance is unmistakable.

To summarize, therefore, the legislative history of the Railway Labor Act shows an intention to make the obligations of Section 2, Ninth, enforceable by process. Such a construction does not impute to Congress an anomalous or inconsistent intention. If Congress did intend to deal differently with carriers upon whose properties a representation dispute existed, that intention is entirely consistent with the practical differences existing between such cases and others where no dispute existed. We do not, however, concede that there is no enforceable obligation to treat placed upon other carriers and, as pointed out above, that there is such an obligation is definitely stated in connection with the procedure outlined by the act for all the purposes of the act.

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or two if of a board of six; and such representative is to sign the agreement to arbitrate in behalf of the employees. 44 Stat. 582 and 584, 48 Stat. 1197, 45 U. S. C. A. 157 and 158. Questions submitted to arbitration are to be withdrawn upon notice in writing signed by the representatives of the parties. 44 Stat. 584, 45 U. S. C. A. 158(f). And the entire submission to arbitration may be revoked by agreement signed by their representatives. 44 Stat. 585, 45 U. S. C. A. 158. An award of a board of arbitration constituted under the Act is to be filed in the office of the clerk of the Federal District Court; and, unless the award is impeached as provided in the Act, the court is required to enter judgment thereon which shall be final and binding on the parties. 44 Stat. 585, 45 U. S. C. A. 159.

"It is clear that all of these provisions, so carefully made for the settlement of disputes which might lead to strikes and industrial warfare, would amount to nothing if the carrier should refuse to recognize or treat with the representatives of its employees * * *." (R. 318, 319.)

b. The Obligation to "Treat" Imposed by Section 2, Ninth, Is Sufficiently Definite To Be Capable of Enforcement by Injunction.

The petitioner argues that this obligation is imperfect in that it is beyond the power of equity to enforce. To "treat," it says, implies negotiation in good faith, and good faith is a state of mind. This is true. But courts are frequently called upon in many types of cases to pass upon the good faith of a party and to estimate his state of mind by his acts. There are no doubt many instances in which bad faith has been successfully concealed. That such may be the case has never been accepted as a valid reason why courts should be barred from inquiring into the facts and from seeking to enforce the law. The difficulty, if any, is one of proof and not of equity jurisdiction.

Furthermore, this argument of the petitioner is based purely on the positive aspects of the statute and the decree of the District Court, and ignores its negative aspects. It must be kept in mind that the carrier was not only ordered to treat with the Federation as the representative of the employees in question, but as a necessary corollary was also ordered *not* to treat with any other person or organization claiming to be such representative. Not only is the negative phase of this decree definitely enforceable, but it also assists in the enforcement of the positive phase. This assistance grows out of the economic relations of the parties. In dealing with numerous employees scattered over the many miles of territory through which a railroad system extends, it has been considered necessary by carriers that they negotiate gen-

eral agreements defining the rights of whole classes or crafts of employees as units. If the carrier is prevented from treating with regard to the negotiation of such agreements with other parties, its own economic self-interest dictates that it treat for that purpose with the certified representative of the employees, and in good faith. The petitioner's argument in this connection is but an elaboration of the homely saying "You may lead a horse to water, but you can't make him drink." Our answer is, prevent the horse from drinking elsewhere and his own thirst will exert the necessary compulsion. If he persists in his refusal, there is still no adequate reason why he should not at least be led to the water.

The Railway Labor Act establishes the course to be pursued by the parties in settling their differences, and provides for a contact between them for that purpose. It forbids any other course, or any other contact. If the interests of both are to be served, the statutory method must be pursued by them.

The decree of the District Court considered as a whole, does not present insuperable difficulties in the matter of its enforcement. The statute outlines no task for the courts of equity more burdensome than others in the carrying out of which these courts now grant injunctions without question.

In summary, therefore:

1. The intention of Congress as shown by the legislative history and all of the provisions of the Railway Labor Act of 1934 was to place an obligation upon carriers to treat with the certified representatives of employees which would be enforceable by process; and

2. That obligation does not impose a burden of enforcement upon the courts which is beyond the possibility of performance.

II. SECTION 2, NINTH, OF THE RAILWAY LABOR ACT AS ABOVE INTERPRETED DOES NOT VIOLATE THE FIFTH AMENDMENT.

It is elementary, of course, that this amendment establishes the extent to which certain individual rights (notably those of property and freedom of contract) will be protected from encroachment on the part of the federal government. The temptation in assailing the constitutionality of any statute under this amendment is to assert the existence of individual rights, point out in what manner the statute limits or eliminates them, and come to the easy conclusion that the unconstitutionality of the law has been established. The petitioner in this case has yielded to this temptation. It has asserted in itself a right of freedom of contract, to treat with whom it chooses, or to refrain from so treating. It has shown that this asserted right is limited by the Railway Labor Act, and now submits to the court the conclusion that the act is void.

Such an argument disregards one important consideration. The amendment by its terms prohibits only a taking of liberty or property when the taking is accomplished without due process of law. The guarantee is, therefore, not an absolute guarantee of absolute rights. This has been decided many times by this court with regard to the very claim of freedom of contract advanced by the appellant.

"It is obvious, from the many decisions of this court, that there is no such thing as absolute freedom of contract. Contracts which contravene public policy cannot be lawfully made at all; and the power to make contracts may in all cases be regulated as to form, evidence, and validity as to third persons. The power of government extends to the denial of liberty of contract to the extent of forbidding or regulating every contract which is reasonably calculated to injuriously affect the public interests."

Atlantic Coastline Ry. Co. vs. Riverside Mills, 219 U. S. 186.

"The liberty of contract guaranteed by the Constitution is freedom from arbitrary restraint—not immunity from reasonable regulation to safeguard the public interest. The question is whether the restrictions of the statute have reasonable relation to a proper purpose."

Liberty Warehouse Co. vs. Burley, etc., 276 U. S. 71.

"It is everywhere recognized that the freedom of the people to enter into and carry out contracts in respect of their property and private affairs is a matter of great public concern and that such liberty may not lightly be impaired. * * * Generally speaking, that right is protected by the due process clauses of the 5th and 14th Amendments. * * * It is also well established by the decisions of this court that such liberty is not absolute or universal, and that Congress may regulate the making and performance of such contracts whenever reasonably necessary to effect any of the great purposes for which the national government was created. * * *"

Highland vs. Russell Car & Snow Plow Company, 279 U. S. 253.

In the case of *Packer Corporation vs. Utah*, 285 U. S. 104, the court had under consideration a statute of the State of Utah making it illegal to display on billboards any advertisement of tobacco or tobacco products. The Packer Corporation had at the time the statute was put into effect, a contract providing for such advertising, and contended that the effect of the statute was to impair the obligation of its contract. The court said:

> "The defendant contends that to make it illegal to carry out the contract under which the advertisement was displayed takes its property without due process of law because it arbitrarily curtails liberty of contract. The contention is without merit. The law deals confessedly with a subject within the scope of the police power. No facts are brought to our attention which establish either that the evil aimed at does not exist or that the statutory remedy is inappropriate."

See also:

Duncan vs. State of Missouri, 152 U. S. 377.
Wagner vs. Leser, 239 U. S. 207.
Chicago, R. I. & Pac. R. R. Co. vs. U. S., 284 U. S. 79.

We must conclude, therefore, that not every statute which regulates the individual's contract rights, or even deprives him of them, comes within the prohibitions made by the Constitution. If the statute has a "*reasonable* relation to a proper purpose" (*Liberty Warehouse Co. vs. Burley, etc., supra*), is "*reasonably* necessary to effect any of the great purposes for which the national government was created" (*Highland vs. Russell Car, etc. Co., supra*), and is not "*inappropriate*" to remedy "the

evil aimed at" (*Packer Corp. vs. Utah, supra*), the statute must be held valid whether contracts or contract rights are affected or not.

Thus it is not sufficient in order to come within the protection of the 5th Amendment that parties should show merely the existence of a right to make a contract, together with a statute which, if enforced, would cut off this right. They must further show that the statute in question, which presumably purports to make restrictions in the interest of the public, is inappropriate to the end sought, and is not one reasonably designed to accomplish its stated purpose.

The cases above cited reveal the superficial nature of the petitioner's argument, and further indicate the extent of the analysis necessary to be made in order to establish the constitutionality of this statute. In such an analysis *we must assure ourselves of the exact nature of the Congressional plan. We must know the exact rights, if any, of which any person is deprived. If we find that there has been such a deprivation, we must consider it in relation to the plan of the statute and the evils sought to be remedied in order to determine whether it is reasonable.*

The general nature of the Congressional plan has already been discussed. We have seen that in essence it consists in fostering collective bargaining between carriers and employees, the bargaining process to be supplemented, if necessary, by the findings of special tribunals when the parties have been unable to agree.

In seeking to apply the principle of collective bargaining to a specific industry, the Congress was faced with the necessity of defining its operation. We do not

understand that the petitioner is challenging the principle of collective bargaining as being unreasonable or arbitrary or outside the power of Congress to establish. It is in the specific applications of the principle that the petitioner purports to find an unconstitutional interference with its contract rights.

Accordingly we must inquire as to what these practical applications are as set up in the Railway Labor Act. It is apparent that collective bargaining connotes group action. Congress, in the exercise of its legislative discretion, deemed it necessary to the successful functioning of its plan to define the nature of the employees' groups through which the contemplated bargaining was to be carried on. In selecting the "craft or class of employees" as such group, Congress was making no arbitrary determination. It was merely recognizing bargaining groups which were already in existence and functioning as such on virtually all of the nation's carriers.

It is further apparent that the craft or class, like any other group of individuals, can act collectively only through representatives selected by it. The next step logically, therefore, was for Congress to establish the means by which such representatives should be chosen. In the earlier Act of 1926 it had already provided that they should be selected without influence, interference or coercion on the part of the carrier, which provision had been held valid and constitutional in the *Texas & New Orleans* case. We have already noted certain practices of certain carriers whose effect had been to prevent the making of a choice of representatives by employees, or what amounts to the same thing, to cause an apparent choice of representatives to be made which would not

represent the true wishes of the craft or class in question. Thus it was not only logical, but necessary, in order to perfect the existing system that Congress establish a method of choosing the necessary representatives. It was accordingly provided that the matter should be determined by consulting the wishes of the majority; that the representatives chosen by the majority should act for the whole bargaining group, and that the carrier should treat exclusively with the representatives so chosen in all matters affecting that group.

From the foregoing discussion it is apparent that the petitioner is first placed under the duty of treating with the representatives of a craft or class selected by the majority, and second, is under the further duty of treating with no one else as the representative of this craft or class, or any group within it. The petitioner argues that these provisions constitute restrictions upon its liberty of contract in two respects: First, it asserts a constitutional right to refuse to treat with representatives selected by the majority (and *a fortiori* with any representative of employees however selected), and second, a further right not to be limited to treating with those selected by the majority, but to treat for the purposes of the act with as many representatives of a craft or class as it desires.

The answer to the first contention is apparent. The Railway Labor Act does not require a carrier to enter into any contract, but merely that it shall negotiate with regard to the matter. The petitioner seeks to evade this argument by saying that the contractural process is indivisible and that it cannot be constitutionally compelled

to even approach the contractural threshold, whether it be compelled to enter or not. This contention loses sight of the nature of the Fifth Amendment to the Constitution, and of the obvious meaning of the phrase liberty of contract. A contract is merely a set of rights and duties arising from agreement. Liberty of contract thus connotes freedom to acquire rights or to engage to perform duties. Where a statute leaves to a person the same freedom in this regard which he enjoyed before its enactment, his liberty of contract has not been impaired. The Railway Labor Act compels a carrier to negotiate. Negotiations are not contracts, and in and of themselves cannot have the effect of bringing into existence contractural rights or duties. The claimed right of freedom to abstain from negotiations, therefore, is one whose existence or non-existence can have no legal or practical effect upon the rights of the petitioner. The purpose of the Fifth Amendment was to provide a protection for valuable individual rights. Until valuable rights are infringed, protection of the Amendment cannot be invoked.

The next assertion of Constitutional right by the petitioner is that it should be free to treat with any representatives of any group of employees if it so chooses. The significance of this claim of right is that the carrier, not the Congress, should have the power to determine the nature of the collective bargaining group of employees, and should be able to deal with groups smaller in size than the craft or class, *i. e.*, disgruntled or favored minorities within the craft or class. As a practical matter, this asserted right is one of mere academic value to the petitioner except as it may be used for the purpose of avoiding or breaking down the regulatory scheme exemplified

by the Railway Labor Act, a result which would certainly follow its successful assertion.

In the negotiation of labor agreements affecting large groups of employees, definitely indentifiable as classes or crafts, it is essential that there be but one accredited representative to negotiate such agreements for each class or craft. The records of the United States Railroad Labor Board, the United States Board of Mediation and the National Mediation Board, fail to disclose a single instance where more than one labor agreement with a carrier has ever been negotiated with any class or craft of employees. This has not occurred by chance. The nature of labor agreements is such that no other course is feasible. If one considers the matters covered by these agreements and the manner in which the rules of the agreement become interlocked in practice, it is obvious that there can be only one schedule or working agreement for the entire class or craft, the provisions of which may not be departed from at the behest of an individual or of representatives of minority groups.

Railroad labor agreements establish the rates of pay, hours of work, rights affecting promotion, demotion and furlough, as well as the additional compensation due for extra services rendered and for overtime. By virtue of the practice long recognized in the railroad industry, labor agreements so negotiated by an accredited representative selected by the majority of the class or craft, have been made applicable to all the employees constituting the class or craft. Any departure from this arrangement in the nature of another agreement applicable only to the individuals constituting a minority group

would inevitably become subversive of the agreement made by the representative of the majority group.

The labor agreements covering rates of pay, rules and working conditions, with which the Railway Labor Act is concerned, are to be distinguished from the individual contracts of employment with each employee. They are the general rules and regulations promulgated by the employer for the government of all employees of a particular class; but instead of the employer arbitrarily issuing such rules without consulting the employees, they are formulated in joint conferences and adopted by mutual agreement.

Assume that the agreement negotiated by the representative of the majority of the machinists' craft of the employees on a given railroad provides that any man who has served an apprenticeship, or has had four years' experience at his trade, and who, by his skill and experience is qualified and capable of performing work generally recognized as that of his craft, shall constitute a machinist; that the rate of pay for specified work is $8.00 per day; that the rate shall be higher if inspectional or other duties are added; that the measure of a day's work is determined by a specified number of hours beyond which punitive rates are applicable; that all the machinists in the shops, engine houses, and repair tracks at each center of employment shall be governed by a common seniority roster and that none but machinists shall do machinists' work as defined. If the carrier recognized more than one representative, to negotiate additional agreements providing standards other than those fixed through negotiation with the representative of the majority group, the

very purpose for which the Railway Labor Act was enacted would fail utterly of realization.

To reiterate, the purpose of the Railway Labor Act is to aid and encourage the railroads and their employees to make and maintain agreements to the end that labor strife and discontent be allayed and labor harmony and good morale prevail; all to the end that there be no interruption of commerce in the public interest. To this end the employees are not only safeguarded by the Act in how they may associate themselves for purposes of selecting representatives to negotiate agreements, but the Act goes further (also in keeping with its basic purpose) and provides an orderly process whereby disputes among employees as to representation may be peacefully settled.

It should not be difficult to see how this purpose would immediately come into jeopardy if the door is open to representatives of minority groups after the labor standards of a given class or craft have been established by agreement with the representatives selected by the majority. The mere fact that a representative designated by the minority may later apply for a separate agreement to cover his constituency injects a disturbing factor into the process laid down by the Act for expediting the otherwise difficult task of establishing jointly accepted labor standards. The presumption is that the minority would not desire a separate agreement unless it wanted something different or better than the majority. The moment the carrier went so far as even to entertain negotiations with a representative of a minority, the very purpose for which the majority agreement was made, namely, to settle a dispute, would be undermined. In its stead the labor unrest previously allayed by agreement

with the representatives of the majority would again begin to develop and grow at an accelerated pace as the negotiations with the minority proceeded. And if these negotiations were to culminate in an agreement, the old issues, adjusted by the representatives selected by the majority, would again come back to life but with renewed vitality. For the majority would then find itself in an anomalous position no matter what the nature of the agreement with the minority representative would amount to, *i. e.*, whether incorporating standards higher than the agreement with the representative of the majority, or lower. In either event, dissatisfaction or apprehension would again plague the labor force and the carrier would be faced with a new dispute. And any such new dispute could only be settled by agreement of the majority of the employees.

Nor is this the only side of the question. From a simple railroad operating standpoint, it would be quite impractical for two groups, majority and minority of the same class or craft or employees, jointly constituting one operating or service organization, to function efficiently under two divergent sets of labor rules. It would be just as practical to expect that the operating organization would function efficiently under two divergent sets of operating rules—and labor rules in many respects are operating rules.

Still other complications would arise to defeat the purposes of the Railway Labor Act if minorities were to be enabled or encouraged to make separate agreements transcending agreements made by the accredited representatives selected by the majority. More than one agreement applying to the same class or craft of employees

would make it necessary at the outset to identify the very individuals to whom the terms of each agreement applied. Thus the individuals constituting the majority group and those constituting the minority group would have to be listed for payroll and other accounting needs. The accounting complications arising in themselves would be expensive. The majority and minority employees would become known with the result, considering the controversial nature of the situation as a whole, that all kinds of disturbances growing out of proselyting and favoritism would ensue to impair the morale of the labor forces. How serious such a situation can become needs no elaboration when the struggle among the employees of industry generally over the right to represent and over the right to perform certain classes of work are visualized. The right of the minority to make separate agreements would place a premium on the generation of a host of just such disputes. This would not be consonant with the purposes of the Railway Labor Act.

And what about employees who come into service after two or more sets of agreements have been negotiated? Under what conditions are they to work, and what kind of machinery would have to be set up to enable them to make their selection? Under what conditions is the employee to work who elects neither the standards of the majority nor the minority group? May he make still another agreement? If so, where is the process to end? Such is the situation which the Railway Labor Act and prior railway labor legislation sought to correct.

Collective bargaining has been recognized by this Court as legitimate and salutary. Its fostering and protection on the nation's carriers as a means of settling

disputes between them and their employees has been recognized as a legitimate congressional function. In the case of *Texas & New Orleans R. R. Co. vs. Brotherhood, supra,* this court said:

> "The legality of collective action on the part of of employees in order to safeguard their proper interests is not to be disputed. It has long been recognized that employees are entitled to organize for the purpose of securing the redress of grievances and to promote agreements with employers relating to rates of pay and conditions of work. *American Steel Foundries vs.Tri-City Cent. Trades Council,* 257 U. S. 184, 209, 66 L. Ed. 189, 199, 27 A. L. R. 360, 42 Sup. Ct. Rep. 72. Congress was not required to ignore this right of the employees but could safeguard it and seek to make their appropriate collective action an instrument of peace rather than of strife. Such collective action would be a mockery if representation were made futile by interferences with freedom of choice." (p. 570.)

If a carrier may not be compelled at least to treat with representatives selected by a majority of a craft or class of its employees, if it may without limit treat with any favored minority, collective bargaining must inevitably fail, and the plan of the Railway Labor Act to provide for the amicable adjustment of disputes will be nullified. If Congress had authority in the first instance to "safeguard" the right of collective bargaining and make it an "instrument of peace," further enactments serving the same end, only more specifically, are neither arbitrary nor unreasonable.

Finally we call to the Court's attention the fact that the petitioner is a common carrier, a public utility, the operator of a business peculiarly charged with the public

interest. Its business may, therefore, be regulated to a greater extend than is the case with other industries without infringing upon the constitutional guarantee of freedon of contract. (*Wilson vs. New*, 243 U. S. 332.)[1]

The petitioner asserts in its brief that the constitutional right of liberty of contract "includes liberty to refuse to have business relations to any extent." (Brief p. 32.) Yet no carrier would today insist upon a constitutional right to refuse to have business relations with a shipper presenting merchandise for transport, and tendering the regular charge. Statutory regulations have been upheld as constitutional which prevent carriers from even offering to contract with shippers other than on the basis of rates reasonably fixed by governmental authority. Privileges and rebates to individuals or localities have been prohibited, although established by contract. Carriers may not by contract grant passes to other than prescribed classes or persons. (*L. & N. Ry. Co. vs. Mottley*, 219 U. S. 467.) In many other respects, the private rights of carriers to enter into contracts have been subjected to unique restrictions conforming to the importance of the services which they perform for the public and the liability of the public to harm if that

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[1] In the above cited case, this court said:

"That the business of common carriers by rail is in a sense a public business because of the interest of society in the continued operation and rightful conduct of such business, and that the public interest begets a public right of regulation to the full extent necessary to secure and protect it, is settled by so many decisions, state and federal, and is illustrated by such a continuous exertion of state and federal legislative power, as to leave no room for question on the subject." (P. 347.)

service is not constantly and justly rendered, all without violation of the Fifth Amendment. That the public is vitally concerned in labor disputes involving carriers and employees is obvious. (The extent of that concern will be considered more appropriately in the section of this brief devoted to the Interstate Commerce power.) The Railway Labor Act is designed to safeguard this public interest. Other statutes dealing with other phases of that interest have been sustained as constitutional, although they have definitely compelled carriers to contract or refrain from contracting, or have definitely fixed the terms upon which the contracts might be made. This statute is more mild. It merely compels the carrier to *negotiate* or *refrain from negotiating* with certain representatives of employees to the end that industrial peace and the continuity of commerce be maintained.

From the point of view, therefore, of the *intrinsic worth to the petitioner of the private rights asserted, the result of their assertion upon the success or failure of the congressional plan of regulation and the nature of the business regulated,* Section 2, Ninth, of the Railway Labor Act appears in the light of a reasonable regulation, and hence valid under the Fifth Amendment.

Nor is this conclusion in any way contrary to that reached by this court in the case of *Carter vs. Carter Coal Co.,* 298 U. S. 238. It will be remembered that the Guffey Act which was involved in the *Carter* case provided that when the producers of a certain percentage of the coal tonnage and a stated percentage of mine workers had, by separate or joint contracts, agreed upon a given standard of wages, that standard immediately became

binding upon all other producers and employees in a given area.[1]

The Railway Labor Act on the other hand gives to the representatives chosen by a majority of a single craft or class of employees who are working for a single employer, the exclusive right to negotiate with that employer. If a contract is made between the carrier and these representatives, it must be applicable to the minority group, but they are bound only when such a contract is actually entered into.

It is true that both statutes employ the term "majority." Here, however, their similarity ceases. The differences between them are marked and fundamental. These differences relate to both the abstract legal consequences of the two acts and to their practical operation. They may be summarized as differences, first, in the collective

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[1] Part 3, Section 808(g):

"Whenever the maximum daily and weekly hours of labor are agreed upon in any contract or contracts negotiated between the producers of more than two-thirds the annual national tonnage production for the preceding calendar year and the representatives of more than one-half the mine workers employed, such maximum hours of labor shall be accepted by all the code members. The wage agreement or agreements negotiated by collective bargaining in any district or group of two or more districts, between representatives of producers of more than two-thirds of the annual tonnage production of such district or each of such districts in a contracting group during the preceding calendar year, and representatives of the majority of the mine workers therein, shall be filed with the Labor Board and shall be accepted as the minimum wages for the various classifications of labor by the code members operating in such district or group of districts. (Aug. 30, 1935, c. 824, Art. 4, 49 Stat. 994 to 1002.)"

unit set up, second in the rights reserved to minority groups, third in the rights given to majority groups, fourth, in the nature of the legal results which flow from any action of representatives of the group selected by the majority, and fifth, in the nature of the industry regulated.

The collective bargaining group contemplated by the Railway Labor Act is a single craft or class of employees of a single carrier. It is essentially a *cooperative* group. Economic competition within the group itself is virtually impossible. While the individual members of the craft may in some instances be competing among themselves in the matter of advancement in their employment, this competition is practically eliminated among railroad workers by the widespread acceptance of seniority as the primary requisite for promotion. As between majority and minority groups within a craft, there is no possible economic competition. There may be differences of opinion, but not based upon clashing economic interests. Members of the majority and the minority perform the same type of work. Their economic future is alike bound up with the success or failure of the business enterprises of a single employer. Any act performed by representatives of the craft must be applicable to the craft as a whole. Any act of the representatives so selected which would result in economic harm to the minority would harm the majority as well. Thus the Railway Labor Act sets up bargaining groups in accordance with the community of interest of the parties.

The unit of action under the Guffey Act on the other hand was the "district or group of two or more districts"

and even in some cases the entire industry. Employers and employees alike were considered as a part of the group and bound by group action. The concept of collective bargaining was extended by that statute to include employers as well as employees. Whether or not such extension might be socially desirable in the coal industry, it is unquestioned that it goes beyond the ordinarily accepted significance of the term "collective bargaining." Under the Guffey Act, the likelihood of economic competition between majority and minority groups instead of being remotely possible, was practically certain. Wage standards in profitable mines could be raised in such manner as to force less profitable operations out of existence. The Guffey Act, therefore, contemplated bargaining groups within which there was no necessary community of interest, and where the power of the majority could be used to harm minority interests.

The two statutes are further distinguishable on the basis of the rights secured to minorities. Under the Railway Labor Act a minority has a real part in the affairs of the bargaining group. It participates in any election held to select representatives. It may at any time challenge the right of the majority to represent the craft and precipitate a new election. It may advise and counsel; it may check majority groups when extreme measures are proposed. It has the same function to perform as a minority party in the affairs of government. Under the Guffey Act, however, the minority had no such power. No election was provided for over an entire district to select representatives for employers or employees to act for the district. As soon as isolated employers and their

employees in the required numbers agreed upon a wage scale, that scale immediately became binding upon the remainder. No right to protest, to counsel, or to participate in elections was reserved to them.

There is a further distinction between the statutes in question in the matter of the rights which are given to the majority groups. The Railway Labor Act *grants no right to a majority which that majority did not have before the passage of the statute.* On every Class A railroad in the United States prior to 1934, there were in existence collective bargaining agreements negotiated by representatives chosen by the majority of employees of the various crafts or classes. These agreements were as binding upon minority groups as they were upon the majorities. The Guffey Act, however, purported to give to majorities *legal rights which they had never before exercised or possessed.* To the majority of producers and miners was attempted to be given the right to fix wages for other producers and their employees. No contract negotiated prior to the passage of the Guffey Act had ever purported to accomplish such a result and to bind non-conforming persons who were not parties to the agreement through representatives or otherwise.

Furthermore there is a far reaching distinction between the legal consequences of the two statutes. The Guffey Act, it will be remembered, provided that when the requisite percentage of the producers and miners agreed, either by separate or joint agreements, upon a wage scale, that scale became binding upon other producers and miners *by operation of law.* The Railway Labor Act makes no such provision. In this statute Congress has in effect said to carriers and their employees,

"We believe that your differences can best be settled through negotiation between you of collective agreements. We desire that you execute such agreements, but we do not and cannot compel you to do so. We do, however, command that if such an agreement is negotiated by any carrier, it be done with a craft or class of employees as a unit, and through representatives chosen by a majority of that craft or class. Such an agreement must be binding upon and give equal rights and duties to all members of the craft or class, majority and minority alike. Any agreement not conforming to these requirements is contrary to the public policy expressed by this act and will not be tolerated."

If the members of the minority are affected by an agreement negotiated for the whole craft or class by representatives chosen by the majority, that effect grows out of the *terms of the contract* (which may or may not be entered into) not out of the application of the statute.

One of the principal reasons given by the court in holding the Guffey Act void was that it was an unconstitutional delegation of legislative power. This objection can certainly not be raised to the Railway Labor Act. We know of no authority for the proposition that a statute, which prescribes rules for the making of contracts, can be said to be a delegation of legislative authority when a contract is entered into conforming to the requirements of the statute, but by voluntary action of the parties. The Railway Labor Act states *in advance* what a contract must provide if a valid contract is to be made. That effect is one which similar contracts ordinarily had by their own terms prior to the enactment of the statute.

The Guffey Act sought to give to a contract a legal effect not provided by its terms *after the contract was executed.* The holding of this court that the latter statute constituted a delegation of legislative power is, therefore, in no way applicable to the provisions of the Railway Labor Act.

Finally, there is a difference between the two statutes which is found in the nature of the businesses regulated by them. The mining of coal, while no doubt a basic industry, has never been considered as a public utility or as a business charged with the public interest in the same sense in which those concepts have been applied to the business of the carriers. While the constitutional standard of "due process" measured by the reasonableness of regulatory statutes is applicable to both types of business, the courts have not hesitated to sustain regulations of rates, equipment, and service as applied to carriers which have been rejected as to other industries (*Cf. Wolff Packing Co. vs. Court of Industrial Relations,* 262 U. S. 522.)

Thus the decision in the *Carter* case is not binding upon the court in this one because of the vast and fundamental differences between the statutes involved, both as to subject matter and as to their legal consequences. As we have shown above, the private rights of contract which the petitioner in this case asserts are of trifling value, practically considered. The public end sought by the statute is of the utmost importance. That end cannot be served without taking from the petitioner these contract rights which it asserts. Accordingly the statute is reasonable and a proper exercise of the Congressional

function of regulation. There is, therefore, no violation of the Fifth Amendment.[1]

III. THE RAILWAY LABOR ACT IS A VALID EXERCISE OF THE INTERSTATE COMMERCE POWER.

The argument of the petitioner in this regard is principally drawn from certain cases decided by this court in connection with the first and second federal Employers' Liability Acts. The first of these acts was made applicable to all employees of carriers. It was declared unconstitutional in the first *Employers' Liability Cases*, 207 U. S. 463, on the ground, as subsequently stated by the court in the case of *Illinois Central R. R. Co. vs. Behrans*, 233 U. S. 473, 58 L. Ed. 1051, that it "attempted to regulate the liability of every carrier in interstate commerce, whether by railroad or otherwise, for any injury to any employee even though his employment had *no connection whatever* with interstate commerce." (Emphasis ours). After the decision in the first Employers'

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[1] The Court of Appeals dismissed summarily the petitioner's contention below that its constitutional rights under the Fifth Amendment had been violated. Following is a quotation from the opinion:

> "We cannot see anything arbitrary or unreasonable in requiring that the carrier recognize the representatives of its employees and treat with them as such; and we do not understand on what theory the carrier can be said to be deprived of liberty or property by such requirement. It is but a reasonable regulation in aid of collective bargaining, which, as said by the Supreme Court, in the *Railway Clerk's* case, Congress has chosen to promote as an instrument of industrial peace." (R. 334.)

Liability cases had been given, the second federal Employers' Liability Act was passed by Congress, limited in its application to employees who at the time of injury were themselves engaged in interstate commerce. The constitutionality of the second act was sustained in *Second Employers' Liability Cases,* 223 U. S. 1. In the application of this act, it became necessary for the court to determine which employees were engaged in interstate commerce. In various decisions based upon this question, this court decided that employees were not so engaged while making repairs upon equipment which had been definitely withdrawn from service for that purpose. The petitioner points out that the Railway Labor Act by its terms is applicable to "every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his services) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission. * * *" (U. S. C. A. Title 45, Sec. 151, para. Fifth; Sec. 1, para. Fifth, Railway Labor Act.) It is further asserted that this definition includes the so-called "back shop employees" or those engaged in making permanent repairs of the sort above noted. The petitioner thus concludes that the act is unconstitutional because it is applicable to employees who are not themselves directly engaged in interstate commerce.

In order to clarify the issue, it may be said at the outset that the respondents agree that a substantial number of the employees involved in this case are "back shop employees," that they perform permanent repairs as indicated, and that such employees come within the express terms of the statute. Our objection, accordingly,

is not to the facts, but to the legal conclusions sought to be drawn therefrom, conclusions which completely ignore a large body of decisions rendered by this court defining the extent of the power of Congress to regulate interstate commerce.

The consideration of whether a person or thing is directly engaged in or being used in interstate commerce affords at best a sort of rule of thumb method of determining whether he or it comes within the scope of federal regulatory power. If so engaged or used, federal authority may doubtless be applied. If not, the opposite conclusion does not follow. The authority of Congress is not governed by the employment of people or things in interstate commerce, but by the effects upon that commerce of the acts or practices sought to be regulated. Indeed, the authority of Congress has been held to extend to at least two classes of cases where purely intrastate matters are or may be involved. *First, the federal government may exercise its power to prevent direct injury or interruption to the flow of interstate commerce whatever may be the source of that injury or interruption. Second, where the operations of a carrier are such that its interstate and intrastate activities are so inextricably commingled that they cannot be separated for the purposes of regulation, the power of Congress has been held to extend to both.*

(a) Interruptions to Interstate Commerce

The Railway Labor Act proceeds upon the theory that interstate commerce is liable to interruptions growing out of disputes between carriers and their employees. The disastrous results of strikes on interstate railroads

is a matter of common knowledge. The effect of such strikes is not limited to those occurring among employees operating trains. This was demonstrated by the Shopmen's Strike of 1922.[1]

That such effects were felt by the Virginian Railway is demonstrated in its answer filed in the District Court, wherein it alleges that this same strike "so interfered with the operation and movement of trains by defendant *in interstate commerce* that defendant applied for and was granted permanent injunctions by the District Courts of the United States for the Western District of Virginia and for the Southern District of West Virginia, respectively, * * *." (R. 44.) (Emphasis ours.)

If the government of the United States has the power to prevent such interruptions to commerce by injunction after the interruption has begun, it has equal power

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[1] This strike was characterized as follows by the court in the case of *United States vs. Railway Employes' Department*, 290 Fed. 978:

> "The general effect of the strike on the performance and operations of the fifty railroads from which testimony was adduced, was to increase delays of freight, passenger, and mail service approximately 50 per cent. The general effect of the strike on the motive power of the 50 railroads from which proof was furnished was to bring about a general breakdown and deterioration of motive power, resulting in the consumption of such surplus motive power as those railroads had on the 1st of July, 1922, and in the inability on the part of most of those roads to perform any *back shop repairs* during the early months of the strike, and in limiting repairs from then on.
>
> "The general effect of the strike on business and industry of the country, as evidenced by the testimony of 53 representatives of leading business concerns of the country, was a general disturbance, slowing down of production, reduction of volume, loss of customers, and monetary losses due

to eliminate the source of the interruption before it occurs. Through the Railway Labor Act, machinery has been provided whereby disputes between carriers and employees may be adjusted in their early stages by orderly process rather than permit them to grow to the proportions of civil strife, when the national government may be compelled to suppress them by the application of force. Reasoning from past experiences, the Congress concluded that the interruptions which it sought to prevent might arise as easily from disputes involving shop employees as from any other class. Nice distinctions between employees engaged in interstate commerce and those not so engaged, or between back shop employees and others, were not attempted, for the reason that no such distinctions have ever been apparent in the results of the disputes involving these various groups. Whatever the group, the ultimate result of a serious dispute between a carrier and its employees has been the same—interruption to interstate commerce, direct and disastrous. Accordingly Congress sought to apply the procedure set up in the statute to all classes of carriers' employees defined as such by the rulings of the Interstate Commerce Commission. In so doing, Congress was applying no novel constitutional theory, but was treading a path well marked by the past decisions of this court.

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to delays on the part of business houses in receiving and obtaining raw materials, and in shipping and transporting finished products. The effect of the strike on the United States Postal Department, as evidenced by the certificate of the Postmaster General, was the discontinuance of 706 trains carrying United States mail, operating over a total of 39,716 miles. As a result of this, 462 United States post offices, serving a population of 352,671 people were without mail service." (P. 981.) (Emphasis ours.)

In the case of *Southern Railroad Co. vs. United States,* 222 U. S. 20, 56 L. Ed. 72, the court had before it the question of the constitutionality of the Safety Appliance Acts. These acts were not limited to requirements of safety appliances on locomotives and cars used in interstate commerce, but were applicable to all equipment however used. For this reason their constitutionality was attacked in the above case. In the course of its opinion sustaining the laws, the court said, with regard to the power of Congress:

> "* * * its power to regulate interstate commerce is plenary, and competently may be exerted to secure the safety of the persons and property transported therein and of those who are employed in such transportation, no matter what may be the source of the dangers which threaten it. That is to say, it is no objection to such an exertion of this power that the dangers intended to be avoided arise, in whole or in part, out of matters connected with intrastate commerce."

See also *Texas & Pac. R. R. Co. vs. Rigsby,* 241 U. S. 33, 60 L. Ed. 874.

In the *Second Employers' Liability Cases,* 223 U. S. 1, the court decided that Congressional power extended to the regulation of rights of action of employees injured while engaged in interstate commerce, although the injuries were caused by the negligence of other employees not so engaged. Not "the source of the injury" said the court, but "its effect upon interstate commerce" is "the criterion of Congressional power."[1]

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[1]The following excerpt from one of the briefs filed was quoted by the court with approval:

> "Congress, of course, can do anything which, in the exercise by itself of a fair discretion, may be deemed appro-

In sustaining the Hours of Service Act as being constitutional in the case of *B. & O. R. R. Co. vs. Interstate Commerce Commission*, 221 U. S. 612, the court said:

> "The length of hours of service has direct relation to the efficiency of the human agencies upon which protection to life and property necessarily depends. * * * In its power suitably to provide for the safety of employees and travelers, Congress was not limited to the enactment of laws relating to mechanical appliances, but it was also competent to consider, and to endeavor to reduce, the dangers incident to the strain of excessive hours of duty on the part of engineers, conductors, train despatchers, telegraphers, and other persons embraced within the class defined by the act." (P. 619.)

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priate to save the act of interstate commerce from prevention or interruption, *or to make that act more secure, more reliable, or more efficient.* The act of interstate commerce is done by the labor of men and with the help of things; and these men and things are the agents and instruments of the commerce. If the agents or instruments are destroyed while they are doing the act, commerce is stopped; if the agents or instruments are interrupted, commerce is interrupted; if the agents or instruments are not of the right kind or quality, commerce in consequence becomes slow or costly or unsafe or otherwise inefficient; and if the conditions under which the agents or instruments do the work of commerce are wrong or disadvantageous, those bad conditions may and often will prevent or interrupt the act of commerce or make it less expeditious, less reliable, less economical, and less secure. Therefore, Congress may legislate about the agents and instruments of interstate commerce, and *about the conditions under which those agents and instruments perform the work of interstate commerce,* whenever such legislation bears, or, in the exercise of a fair legislative discretion, can be deemed to bear, upon the *reliability* or *promptness* or *economy* or *security* or *utility* of the interstate commerce act." (Emphasis ours.)

The Adamson Act prescribing the eight-hour day among railroad employees was upheld as constitutional in the case of *Wilson vs. New,* 243 U. S. 332, on the express theory that plenary legislative authority reposed in Congress to protect and preserve interstate commerce.[1]

The doctrine of these earlier cases was used as the foundation of the Transportation Act of 1920. Concerning this statute, which as we have seen was the predecessor of the present Railway Labor Act, this court said, in the *New England Divisions Case,* 261 U. S. 184:

> "Transportation Act, 1920, introduced into the federal legislation a new railroad policy. *Railroad Commission of Wisconsin vs. Chicago, Burlington & Quincy R. R. Co.,* 257 U. S. 563, 585. Theretofore the effort of Congress had been directed mainly to the prevention of abuses; particularly, those arising from excessive or discriminatory rates. The 1920 Act sought to insure, also, adequate transportation service. That such was its purpose, Congress did not leave to inference. The new purpose was expressed in unequivocal language. And to attain it, new rights, new obligations, new machinery, were created. The new provisions took a wide range."

And in the *Dayton-Goose Creek Ry. Co. vs. United States,* 263 U. S. 456, 478, this Court said, in sustaining the "recapture" provisions of the Transportation Act of 1920:

> "In both cases (*C. B. & Q. R. R. vs. United States,* 257 U. S. 563; *New England Divisions Case,* 261 U. S. 184) it was pointed out that the Trans-

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[1] The Hours of Service Act and the Adamson Act are cited as illustrations of legislative trends not because they are in themselves applicable to back shop employees.

portation Act adds a new and important object to previous interstate commerce legislation, which was designed primarily to prevent unreasonable or discriminatory rates against persons and localities. The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission, which is to supervise their issue of securities, their car supply and distribution, their joint use of terminals, their construction of new lines, their abandonment of old lines, and by a proper division of joint rates, and by fixing adequate rates for interstate commerce, and in case of discrimination, for intrastate commerce, to secure a fair return upon the properties of the carriers engaged.

"It was insisted in the two cases referred to, and it is insisted here, that the power to regulate interstate commerce is limited to the fixing of reasonable rates and the prevention of those which are discriminatory, and that when these objects are attained, the power of regulation is exhausted. This is too narrow a view of the commerce clause. *To regulate in the sense intended is to foster, protect and control the commerce with appropriate regard to the welfare of those who are immediately concerned, as well as the public at large, and to promote its growth and insure its safety.*" (Emphasis ours.)

The Railway Labor Act in its original form as enacted in 1926, included a definition of the term "employee" identical with that used in the amended act of

1934. If the latter statute is unconstitutional because it includes provisions relating to employees not engaged in interstate commerce, the earlier one must have been unconstitutional also. The Act of 1926, however, was upheld by this Court as valid in the case of *Texas & N. O. R. Co. vs. Brotherhood,* 281 U. S. 548. The same argument appears to have been advanced in that case as is urged by the petitioner here,[1] and was rejected by this Court in these words:

> "We entertain no doubt of the constitutional authority of Congress to enact the prohibition. The power to regulate commerce is the power to enact

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[1] The nature of this argument appears more specifically in the opinion of the United States Circuit Court of Appeals for the 5th Circuit where that court stated:

> "The provision in question was attacked on the ground that it was beyond the power of Congress to enact it. We think that under the power to regulate interstate commerce it is competent for Congress to make provision for the settlement of disputes between interstate carriers and their employees with reference to rates of wages, rules, and working conditions, to the end of preventing such disputes resulting in the interruption or stopping of the movement in interstate commerce of freight or passengers. *Wilson vs. New,* 243 U. S. 364, 37 S. Ct. 298, 61 L. Ed. 755, L. R. A. 1917E, 938, Ann. Cas. 1918A, 1024. Certainly a not inappropriate feature of such a provision would be one having a tendency to secure to each of the parties to such a dispute, when an attempt to effect a settlement of the dispute is to be made, the opportunity of selecting a representative not subject to the domination or under influence of the other party, as a settlement could not reasonably be expected to be satisfactory to both the parties and the public where one of the parties to the dispute was not loyally or fairly represented in the transaction which resulted in the settlement. To say the least, we have not been convinced of the invalidity of the provision in question." *Texas & N. O. R. Co. vs. Brotherhood of Ry. & S. S. Clerks,* 33 F .(2d) 13.

'all appropriate legislation' for its 'protection and advancement' (*The Daniel Ball*, 10 Wall. 557, 564, 19 L. Ed. 999, 1001); to adopt measures 'to promote its growth and insure its safety' (*Mobile County vs. Kimball*, 102 U. S. 691, 696, 697, 26 L. Ed. 238, 239, 240); to 'foster, protect, control and restrain' (*Second Employers' Liability Cases* (*Mondou vs. New York, N. H. & H. R. Co.*) 223 U. S. 1, 47, 56 L. Ed. 327, 345, 38 L. R. A. (N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875). Exercising this authority, Congress may facilitate the amicable settlements of disputes which threaten the service of the necessary agencies of interstate transportation. In shaping its legislation to this end, Congress was entitled to take cognizance of actual conditions and to address itself to practicable measures. The legality of collective action on the part of employees in order to safeguard their proper interests is not to be disputed. It has long been recognized that employees are entitled to organize for the purpose of securing the redress of grievances and to promote agreements with employers relating to rates of pay and conditions of work. *American Steel Foundries vs. Tri-City Cent. Trades Council*, 247 U. S. 184, 209, 66 L. Ed. 189, 199, 27 A. L. R. 360, 42 Sup. Ct. Rep. 72. Congress was not required to ignore this right of the employees but could safeguard it and seek to make their appropriate collective action an instrument of peace rather than of strife. Such collective action would be a mockery if representation were made futile by interference with freedom of choice. Thus the prohibition by Congress of interference with the selection of representatives for the purpose of negotiation and conference between employers and employees, instead of being an invasion of the constitutional right of either, was based on the recognition of the rights of both." (The opinion of the District Court in the above case may be found in Vol. 24 Fed. 2d, page 426.)

The case of *Texas & N. O. R. Co. vs. Brotherhood* was commented upon in the recently decided case of *Railroad Retirement Board vs. Alton Railroad Company*, 295 U. S. 330, at page 369, as follows:

> "The railway labor act was upheld by this court upon the express ground that to facilitate the amicable settlement of disputes which threatened the service of the necessary agencies of interstate transportation tended to prevent interruptions of service and was therefore within the delegated power of regulation."

In another recent case, that of *Schechter vs. United States*, 295 U. S. 495, this Court again had occasion to define the extent of the regulatory power of Congress as to interstate commerce. We find the following statement of the law on page 554 of the opinion:

> "The power of Congress extends not only to the regulation of transactions which are part of interstate commerce, but to the protection of that commerce from injury. It matters not that the injury may be due to the conduct of those engaged in intrastate operations. Thus, Congress may protect the safety of those employed in interstate transportation 'no matter what may be the source of the dangers which threaten it.' *Southern R. Co. vs. United States*, 222 U. S. 20, 27, 56 L. Ed. 72, 75, 32 S. Ct. 2, 3 N.C.C.A. 822. We said in *Second Employers' Liability Cases* (*Mondou vs. New York, N. H. & H. R. Co.*) 233 U. S. 1, 51, 56 L. Ed. 327, 346, 32 S. Ct. 169, 38 L. R. A. (N. S.) 44, 1 N. C. C. A. 875, that it is the 'effect upon interstate commerce,' not 'the source of the injury' which is 'the criterion of congressional power.' We have held that in dealing with common carriers engaged in both interstate and intrastate commerce, the dominant authority of Congress necessarily embraces the right to control their intrastate operations in

all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to secure the freedom of that traffic from interference or unjust discrimination and to promote the efficiency of the interstate service. *The Shreveport Case* (*Houston, E. & W. T. R. Co. vs. United States*) 234 U. S. 342, 351, 352, 58 L. Ed. 1341, 1348, 1349, 34 S. Ct. 806; *Railroad Commission vs. Chicago, B. & Q. R. Co.*, 257 U. S. 563, 583, 66 L. Ed. 371, 381, 42 S. Ct. 232, 22 A. L. R. 1086. And combinations and conspiracies to restrain interstate commerce, or to monopolize any part of it, are none the less within the reach of the Anti-Trust Act, because the conspirators seek to attain their end by means of intrastate activities. *Coronado Coal Co. vs. United Mine Workers*, 268 U. S. 295, 310, 69 L. Ed. 963, 970, 45 S. Ct. 551; *Bedford Cut Stone Co. vs. Journeymen Stonecutters' Asso.*, 274 U. S. 37, 56, 71 L. Ed. 916, 920, 47 S. Ct. 522, 54 A. L. R. 791."

The law is therefore well settled that the power of Congress to regulate interstate and foreign commerce extends to all matters which directly interrupt or interfere with that commerce or impair the efficiency of the agencies which are engaged in it. The pleadings of the petitioner filed in the court below, the reports of decided cases and past events which are matters of common knowledge, are all eloquent of the fact that labor disputes and disorders may interfere with and disrupt commercial enterprise. These effects have come from disputes involving back shop employees as well as others. The effect and not the source of the injury being the criterion, the existence of Congressional power as a general principle is well established. Finally, however, this Court has sustained the Railway Labor Act of 1926, which according

to its terms applied to exactly the same employees as the present one, on the express ground that Congress might legitimately act to protect interstate commerce from the effect of "disputes which threatened the service of the necessary agencies of interstate transportation." The weight of authority opposing the petitioner's contention in this case is overwhelming.

(b) Co-mingling of Employees Engaged in Interstate Commerce and Others as to Relations With Employing Carriers.

There is another factor closely allied to the above in many respects which is also important in determining the scope of federal power in regulating interstate commerce. Where the functions of a carrier engaged in such commerce are of a sort that its activities, both in interstate commerce and otherwise, are so intimately connected that their separation for the purposes of regulation is impossible, the power of Congress has been held to extend to both.

This argument was used *inter alia* in sustaining the constitutionality of the Safety Appliance Acts. *(Southern Railway Co. vs. United States, supra.)*

The case of *Interstate Commerce Commission vs. Goodrich Transportation Company*, 224 U. S. 194, involved an order of the Interstate Commerce Commission requiring of carriers a uniform system of accounting as to commerce, both interstate and intrastate in nature. It was contended that the constitutional power to regulate interstate commerce had been transcended. The Court rejected this argument, however, saying:

"The learned commerce court was of the opinion that the Commission might require accounts and reports, so far as the business of the water carriers with reference to joint rates by rail and water under a common arrangement was concerned, and remanded the cases to the Commission for revision of their orders upon that basis. But it is argued for the Commission, and it seems to us, with great force, that it would be impracticable to make such separation in any system of accounting. It is a matter of general knowledge, of which we may take judicial notice, that traffic of all kinds is conducted upon the same ship and passage. A boat may leave a lake port carrying passengers and freight destined for ports within the state and for ports beyond the state, and as a part of the freight for carriage embrace some carried under the terms terms of joint arrangements made with connecting railroad carriers. How would it be practicable to separate the items of expense entailed in the carriage of these various classes? It is done upon one boat, with one set of officers and crew, and must, in the nature of things, be under one general bill of expense,—at least it would seem impracticable to separate it into its items, so as to show the expense of that which it is contended is alone within the terms of the act, as construed by the carriers.

"We think the act should be given a practical construction, and one which will enable the Commission to perform the duties required of it by Congress; * * " (p. 214.)

In the *Minnesota Rate Cases*, 230 U. S. 352, this principle was further stated as follows:

"The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects com-

> mitted to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. This is not to say that the Nation may deal with the internal concerns of the State as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the Supremacy of the national power within its appointed sphere."

This rule of law is peculiarly applicable to this case. The difficulty experienced by the courts in determining whether a single employee is engaged in interstate commerce at a single moment of time (in applying the second federal Employers' Liability Act) is attested by the vast number of cases on the point. The decisions both state and federal are hopelessly contradictory, and many situations have been presented to this court for final adjudication. The confusion which would follow any attempt to separate employees for the purpose of regulation of labor relations with their employing carriers would be so great as to render any such plan unworkable. Here we would have involved not a single employee, nor a single moment of time as in the case of an injury, but numbers of employees and long courses of relationships between them and their employer extending over many years. Consider two groups of employees of the same carrier performing similar tasks, *e. g.*, those performed by machinists, the one group making running repairs, the other working in the back shop, the one therefore working in interstate commerce, the other not. Both groups belong to the same craft, usually both belong to the same labor

organization. Their economic interests are virtually identical. Labor unrest may easily spread from one to the other. No practical distinction is maintained between them in the operation of a railroad. Neither group is static. A given employee may be in one category today and the other tomorrow or in any one day he may perform tasks appertaining to both groups.

All this is strikingly illustrated by the situation now existing on the Virginian Railroad. The wages, hours of labor, general working conditions and the classes into which employees are divided in relation to their work, are all set up in an agreement entered into between petitioner and its mechanical department employees at the time ostensibly represented by the Association. (This agreement is Defendants' Exhibit R introduced in the District Court, not all of which was printed in the record. Portions are here referred to by stipulation of counsel on file in this court as approved by the trial judge.) By rule 37 of this agreement, and the appendix thereto, the rates of pay for certain crafts and types of workmen are fixed and made uniform, regardless of whether they are working in a back shop or not. Seniority lists are to be prepared "for each craft and subdivision thereof" (Rule 28-a). Separate lists are not maintained for back shop employees and those making running repairs. A given employee may, therefore, be shifted from the one type of work to the other as his seniority requires. In the training of apprentices (Rule 36-f) the carrier agrees to shift apprentice workmen from one type of employment to another, and even from shop to shop in order that they may become acquainted with "all branches of the trade." In defining

the duties of each craft in this agreement, no distinction is made between back shop and running repairs. (See rule 101 in relation to carmen). Any employee working in the back shop or other permanent location is subject to call at any time to perform road service, emergency, routine, or running repairs relating to his craft. (See rules 8-a, 52, 60, 89, 107.)[1]

In all of this there is no mention of back shop employees as a special group for whom a specialized form of treatment is appropriate or possible. That this carrier has attempted no such division in practice as it says

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[1] *Emergency Road Service.* Rule 8(a). An employe regularly assigned to work at a shop, engine house, repair track, or inspection house, repair track, or inspection point, will be paid from the time ordered to leave home station until his return for all time worked in accordance with the practice at home station and straight time rate for all time waiting or traveling.

Overtime—Regular Assigned Road Work, Hourly Basis. Rule 12(a). Employes regularly assigned to road work whose tour of duty is regular and who leave and return to home station daily (a boarding car to be considered a home station) shall be paid continuous time from the time of leaving the home station to the time they return, whether working, waiting or traveling, exclusive of the meal period, as follows: * * *

Work at Wrecks. Rule 52. In case of wrecks where engines are disabled, machinist and helper, if necessary, shall accompany the wrecker. They will work under the direction of the wreck foreman.

Running Repair Work. Rule 60. Boilermakers who have been working on hot work will not be required to work on cold work until given sufficient time to cool off.

Road Work. Rule 89. Sheet metal workers will be sent out on line of road and to outlying points, when their services are required, but not for small, unimportant running repair jobs.

Repair Work on Road. Rule 107. When necessary to repair cars on the road or away from the shops, carmen, and helper, when necessary, will be sent to perform such work as putting in couplers, draft rods, draft timbers, arch bars, center pins, putting cars on center, truss rods, wheel, and work of similar character.

exists between back shop employees and others, in regulating its own business affairs is the best evidence that such a division is entirely impracticable. According to the petitioner's argument, so long as an employee is engaged in activities which are a part of interstate commerce, he is subject to federal regulations under the Railway Labor Act or some similar statute. His right to collective bargaining, his right to representation for the purpose of collective bargaining, the agreements governing his wages, hours of labor, and working conditions, are matters subject to federal control. As soon as the character of his work changes, his rights change. He is now subject to regulation by the state wherein his services are rendered. He may well find himself working under a different contract, negotiated for him through a different representative. His wages, his hours, his general rights all may vary. It would be impossible for any enforcement agency, or for the carriers or employees themselves, to keep pace with this kaleidoscopic situation. Federal power over a field admittedly within its scope would be effectively nullified. Such is not the purpose of the Constitution.[1]

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[1] This whole situation, both with regard to the power of Congress to legislate in such manner as to prevent interruptions to interstate commerce and with regard to the impracticability of attempting a separation among shop employees according to the character of their duties was admirably summarized by the Circuit Court in the following quotation from its opinion:

> "The purpose of the Railway Labor Act is to prevent the interruption of the business of an interstate carrier resulting from strikes and other industrial disturbances by providing for collective bargaining between such carrier and its employees and the settlement of labor disputes by agreement and arbitration. (47 Stat. 70, 29 U. S. C. A. 102.) For the machinery thus provided to be effective, it

This conclusion is fully in accord with recent decisions of the lower federal courts and of this court with regard to other regulatory statutes of the United States which found their authority in the interstate commerce power of Congress, particularly the cases of *Schechter vs. United States, supra,* and *Carter vs. Carter Coal Company, supra.* This court in those cases was careful to distinguish between the production of such goods as would ultimately be transported in interstate commerce, the handling of those goods after commerce had ceased, and the commercial process itself. Labor disputes in businesses whose function is production or distribution though they might be effective to prevent the goods in question from entering interstate commerce, and by inference though they might so clog the machinery of distribu-

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must apply to all of the employees of an interstate carrier; for not only would it not be practicable to establish separate organizations for bargaining among the employees engaged in interstate commerce as distinguished from those who are not, but disturbances among the latter would inevitably disturb the interstate business of the carrier and would almost necessarily be communicated to the employees engaged in interstate transportation. The defendant, for example, employs machinists engaged strictly in interstate commerce as well as those who are employed in 'back shop' work. It would be out of the question for it to bargain with the former and not with the latter; and, even if this were possible a labor controversy with those involved in 'back shop' work would be communicated to the others and a strike of the 'back shop' workmen, if confined to them, would necessarily interfere with the carrying on of the interstate commerce in which the road is engaged. A typical case is presented, therefore, where Congress must regulate the relationship between the carrier and its employees not engaged directly in interstate transportation, as well as those who are so engaged, to regulate effectively the flow of interstate commerce over which it has plenary power and to prevent interference therewith." (R. 324, 325.)

tion as to ultimately dam up the commercial stream, were considered by the court as affecting interstate commerce only indirectly. These cases establish no rule of law exempting the field of labor relations as such from the scope of federal regulation. They merely define commerce and point out those acts which may be said to directly affect it. The doctrine expressed in the case of *Texas & N. O. R. Co. vs. Brotherhood of Railway and Steamship Clerks* has not been disturbed or modified by these later decisions.

In summary, therefore, both because labor disputes involving employees of interstate carriers generally and back shop employees in particular are likely to interrupt the flow of interstate commerce, and because the relationships of any carrier with its various employee groups are so closely intertwined the one with the other as to make their separation for the purposes of regulation impossible, the federal power in this connection must extend to the regulation of the relations of carriers with all their employees as defined in the act without regard to the nature of the work performed by them.

IV. THE CERTIFICATION OF THE NATIONAL MEDIATION BOARD IS VALID

Section 2—Fourth of the Railway Labor Acts reads in part as follows:

> "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this act."

It will be recalled that Section 2, Ninth, authorizes the National Mediation Board to hold a secret ballot or election to determine the choice of any craft or class of employees as to who shall be its representative. The petitioner contends that Section 2, Fourth, provides a rule for the conduct of elections held under Section 2, Ninth. This alleged rule is said to be that a majority of the members of a craft or class who are *eligible to vote* must vote in favor of a certain candidate in order to constitute a valid choice.

On the basis of this contention the petitioner attacks the certification of the National Mediation Board on two grounds, first because in one craft (blacksmiths) the Federation did not receive the votes of a majority of the eligible voters (although a majority of the eligibles voted and a majority of those voting cast ballots in favor of the Federation), and, second, because while as to each craft the board's certification recites the number of employees voting for the Federation and for the Association and certifies that the Federation is the choice of the members of each as their representative, it does not also recite the number of eligibles nor state in terms that a majority of each craft or class desired representation by the Federation.

Two questions are thus presented to the court relating to (a) the proper interpretation of Section 2, Fourth, of the Railway Labor Act in representation elections, and (b) what statements of fact must necessarily be contained in a certification of the National Mediation Board as prerequisites to its validity.

a. Interpretation of the Word "Majority" as Used in Section 2, Fourth, of the Railway Labor Act.

Where a majority vote of any electorate is required to determine an issue, it is the general rule of elections that a majority of those voting is sufficient. Those absenting themselves from the polls are presumed to accept the choice of a majority of the active voters.

> "All qualified voters, who absent themselves from an election duly called, are presumed to assent to the expressed will of the majority of those voting, unless the law providing for the election otherwise declares. Any other rule would be productive of the greatest inconvenience and ought not to be adopted, unless the legislative will to that effect is clearly expressed." *Carroll County vs. Smith,* 111 U. S. 556.

See also *Cass County vs. Johnson,* 95 U. S. 360, where a statute authorized municipal aid to a railroad corporation only on the assent of "a majority of the legal voters of a township." The court presumed that all qualified voters, who absented themselves from a meeting duly called, assented to the expressed will of a majority of these voting. See also *St. Joseph's Township vs. Rogers,* 16 Wall. 644; *Smith vs. Proctor,* 130 N. Y. 319, 29 N. E. 312; *Louisville & N. R. Co. vs. Davidson County Court,* 1 Sneed (Tenn.) 637, 62 Am. Dec. 424; *Montgomery County vs. Trimble,* 104 Ky. 629, 47 S. W. 773.

The petitioner's argument in connection with the Railway Labor Act is directly contrary to the foregoing authorities. Instead of the silence of the non-voting member of the craft being presumed to give consent, it is contended that it must be considered as expressing dis-

sent from whatever view is stated by the majority of the voters. It arbitrarily places a statement of opinion in the mouths of those too careless or perhaps too fearful of their employer's displeasure to express an opinion.

Such an interpretation of the term majority would lead to chaos in our political elections. It is particularly vicious in relation to elections held under the Railway Labor Act when we consider the atmosphere of coercion and employer pressure, in which this statute necessarily operates. It is of the essence of Section 2, Ninth, that any election conducted by the National Mediation Board must be secret, in order that it express a free and uncoerced choice. If every non-voter by his mere failure to vote may in effect cast a ballot for an existing company-favored organization, a carrier may easily dominate an election by spreading the word among the employees that it is wise to remain away from the polls if they desire to remain in its good graces. The names of those who do or do not vote are easily ascertainable. If the non-voter therefore, is to be arbitrarily credited with a statement of opinion, the secrecy of the ballot is in large measure lost and its effectiveness as an instrument for determining the free choice of the employees is destroyed. These identical tactics were in fact attempted in this case, for there is evidence in the record (R-116) that an official of the petitioner informed certain employees that to stay away from the polls would indicate that they were "For the company." It does not seem reasonable that Congress should have been to so much pains to provide a free and secret method for choosing representatives and then have further intended to nullify the whole by attaching the meaning to the phrase "majority of a craft or class" for which the petitioner contends.

We are not limited, however, to a consideration of the phrase in question standing alone or in relation to the remainder of the act in order to determine its meaning, for that meaning had been fixed and established long before it was incorporated into this statute. Where statutory language has been substantially adopted from some other source, interpretations of that language made prior to the adoption are available to the courts, not as an absolute or unavoidable rule for determining its meaning, but as an aid to construction. This rule is well established as to borrowed statutes which have received judicial construction in the jurisdiction from which borrowed. It has frequently been applied by this court to statutory provisions which have received an administrative construction and subsequently have been substantially re-enacted. *Brewster vs. Gage,* 280 U. S. 327, *Murphy Oil Company vs. Barnet,* 287 U. S. 299.

This rule of law is based upon common sense. Where language has already received a settled construction, and is enacted or re-enacted as a portion of the statutory law of the jurisdiction, the reasonable presumption is that this was done with the intent to adopt the construction along with the language.

The reason for the rule is applicable to principles formulated by administrative bodies which have been interpreted and applied by them and are subsequently made a portion of the statute law. This is the history of the language under consideration. The principle of majority rule within the craft or class was first announced by the United States Railroad Labor Board as one of sixteen principles stated by the board as a basis for its future action. This statement of principles is set up in Exhibit

B of its decision No. 119 in the case of *International Association of Machinists et al. vs. A. T. & S. F. Ry. et al.*, Vol. II, Decisions of the United States Railroad Labor Board, page 87, at page 96. The language used by the board is as follows:

> "15. The majority of any craft or class of employees shall have the right to determine what organization shall represent members of such craft or class. Such organization shall have the right to make an agreement which shall apply to all employees in such craft or class. No such agreement shall infringe, however, upon the right of employees not members of the organization representing the majority to present grievances either in person or by representatives of their own choice."

The first sentence of the above quotation is substantially identical with the language of the second sentence of Section 2, paragraph Fourth, of the present Railway Labor Act.

The Railroad Labor Board was called upon to interpret the above quotation from its decision 119 in the case of *Brotherhood of Railway and Steamship Clerks vs. Southern Pacific Lines,* Decision No. 1971, Volume IV, United States Railroad Board Decisions, page 625. In the representation election involved in that case there were 1635 eligible voters and 1181 votes cast. The question was whether a majority of the class or craft meant a majority of the former number or of the latter. The board decided that "majority" meant a majority of those voting, not a majority of the eligibles.[1]

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[1]The following quotation is from the opinion of the Board:

"The carrier understands that principle 15 of Decision No. 119, reading in part as follows:

'The majority of any craft or class of employees shall

This opinion established the settled rule of the board, in the application of its principle No. 15 to representation elections, for all subsequent cases. This rule was applied during the remainder of the board's period of existence, which was between four and five years.

Both the lower courts which considered this case found that the term "majority" should be interpreted as meaning a majority of those voting, not a majority of the eligibles, at least in a case where a majority of the eligibles had participated in the election. The Circuit

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have the right to determine what organization shall represent members of such craft or class * * *,'

requires the carrier to deal with the representatives selected by a majority of any craft or class, and that such representatives must have the authorization of a majority of the employees of the class involved. * * *

"In prescribing a method for justly and fairly ascertaining and determining in cases of disputes the question as to who are 'representatives, designated and authorized,' as provided by the Transportation Act, 1920, to confer and settle disputes, the Railroad Labor Board adopted and prescribed a procedure for holding an election, and in Decisions Nos. 218 and 220 prescribed a method to be observed in conducting such elections by secret ballot so as to secure a fair and true expression of the choice of the employees.

"The board had previously in principle 15 of Decision 119, ruled that 'the majority of any craft or class of employees *shall have the right to determine* what organization shall represent members of such craft or class' in negotiating agreements.

"The purpose of the Railroad Labor Board was to give all the employees to be affected the privilege of expressing their choice. The board could not force any employee nor all of the employees to vote. It could only give all a fair opportunity.

"It was obviously the meaning and the purpose of the board that a majority of the votes properly cast and counted in an election properly held should determine the will and choice of the class."

Court of Appeals stated its opinion on the point as follows:

> "If a majority of the craft participate in an election, the majority of those voting is sufficient. Whether the choice of those voting would also be valid even if a majority of the eligible voters do not participate in the election is a question we need not now decide." (R. 339.)

(For full discussion by the Circuit Court see R. 334 to R. 339, inclusive. For the opinion of the District Court see R. 267.)

These rulings were expressly approved by the Circuit Court of Appeals for the Seventh Circuit in the case of *Association of Clerical Employees, etc., vs. Brotherhood of Railway and Steamship Clerks*, 85 F. (2d) 152. The case before that court was substantially the same on its facts as this one. The court held that the election results should be determined by a majority of the votes cast. Its comment on the opinions below as rendered in this case is as follows:

> "The conclusion was reached that where a majority of those qualified to vote had in fact voted, a proposed representative receiving a majority of the quorum which thus voted was the duly elected representative under the statute. Upon the question of the vote necessary under the amended statute, we are in full accord with the reasoning and conclusion of the opinion of the Fourth C. C. A., as well as that of District Judge Way." (P. 156.)

The purposes of the act, the consequences of giving it the interpretation contended for by the appellant, as well as the construction placed upon this language before it became a part of the statute, all indicate an intent on

the part of Congress that the word "majority" as applied to a representation election should receive its usual and accepted meaning, *i. e.*, a majority of the votes cast. Both on principle and authority, therefore, the decision of the lower courts as to this point should be affirmed.

b. The Certification Stated All Facts and Conclusions of Fact Necessary to Its Validity

The certification of the National Mediation Board (set up in full R. 13 *et seq.*) states fully the result of the election held among the mechanical department employees of the Virginian Railway. The number of votes cast in each craft in favor of each candidate appears on the face of the certification. The total number voting can, of course, be ascertained by a simple process of addition. Further we find in the certification the following general statement:

> "On the basis of this investigation and report, the National Mediation Board hereby certifies that the System Federation No. 40, Railway Employes Department, American Federation of Labor, has been duly designated and authorized to represent the mechanical department employees of the Virginian Railway Company."

The petitioner claims that it does not appear on the face of the certification that a majority of any craft or class voted for the Federation or that such majority participated in the election. We have already shown that the statute does not contemplate that a majority of the whole craft or class must vote for the successful candidate. In any event, in order to demonstrate that a majority participated in the election, or how a majority

voted, the only figures in addition to those already supplied by the board which would be needed to show these facts would be the number of eligible voters in each craft or class. These figures were, as a matter of fact, ascertained by the board, were known to the parties, and were indeed introduced into the record of this case. They were matters peculiarly within the knowledge of the petitioner and were in fact secured by the board in the first instance from the petitioner's own payroll. Their absence *from the certification* is the real basis of the petitioner's objection.

In support of its position in this regard, the petitioner cites such cases as *Panama Refining Company vs. Ryan,* 293 U. S. 388; *United States vs. Chicago, M. St. P. and Pac. R. R. Co.,* 294 U. S. 499, and *Atchison, T. & S. F. R. R. Co. vs. United States,* 295 U. S. 193. These cases state the undeniable rule that where a certain finding of fact by an administrative tribunal is a necessary prerequisite to its making an order, the finding must be stated in the order. The reason for the rule is obvious, and is stated in the above opinions. A reviewing court is entitled to test the order to ascertain whether it is supported by the finding. Without knowing what the finding is, review is, of course, impossible and the order is void.

The analogy between the cited cases and the present one is imperfect. If the Railway Labor Act were so worded that it empowered the National Mediation Board to proceed exactly as at present, with the further provision that having ascertained the name of the representative desired by the employees *it might order the carrier*

to treat with this representative, and if under such a statute the board were to make an order commanding a carrier to treat with a certain party as representative without including a finding that such party was the chosen representative of these employees, then we would have a case coming within the rule stated.

Under the Railway Labor Act, however, the requirement to "treat" is imposed *directly by the statute*. The National Mediation Board is empowered to make *no order* in this respect. Its functions do not extend to the making of orders. It is purely a fact-finding body. The certification of the board in this case is *not an order* at all, but a *finding of fact only*. Thus both the language and the reasoning of the cases cited by the petitioner are entirely inapplicable.

The number of eligible voters in any craft or class of employees, or the number necessary to constitute a majority, were not the ultimate facts with which the board was dealing. At best they were mere matters of evidence going to support the finding of fact which the board would make. It is apparent, therefore, that the petitioner is complaining, not because the board stated no finding of fact, for it did that, but because the board did not also state in its certification *all of the items of evidence upon which that finding was based*. We know of no case, and the petitioner has cited none, supporting a contention that under such circumstances the certification of the board should be held void.

V. THE NORRIS-LaGUARDIA ACT IS NOT APPLICABLE TO THE SITUATION INVOLVED IN THIS CASE.

The Norris-LaGuardia, or Anti-Injunction, Act so-called, is a statute of the United States adopted March 23, 1932 (29 U.S.C.A., Sections 101 to 115, Incl.) This act limits the power of the federal courts to grant injunctions in various types of cases involving labor disputes.[1]

The petitioner has invoked several provisions of this statute which are claimed to be applicable to this case. These sections, it asserts, make the granting of an injunction against it improper under the circumstances.

The first provision invoked is set forth in Section 4 and reads thus:

> "No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts. * * *
>
> (e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence; * * *"

It must be noted that petitioner does not contend that the order of the District Court enjoins it from giving publicity to the facts of this or any other labor dispute. It merely asserts that the injunction against influence, interference and coercion which the District Court did

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[1] For the full text of relevant sections of this statute see Appendix II of this brief, page 121.

grant was "bottomed" upon certain acts of the petitioner, which, it is claimed, amounted to a mere giving of publicity (*e. g.*, The Sasser Statement) and that in consequence the injunction is unlawful.

This argument of the petitioner's is faulty in several respects. In the first place it involves a novel interpretation of the word "publicity," which is derived from "public" and normally refers to information disseminated to the members of the public at large. A statement of position prepared by one party to a dispute addressed to *the other parties* and distributed among them cannot be said to be a giving of "publicity" to the facts of a dispute in any proper sense of the term.

Furthermore a reading of the decree of the District Court will reveal that it is "bottomed" not upon mere publicity but upon acts of influence, interference and coercion of which The Sasser Statement was held to be one. There is nothing in the decree of the District Court which expressly or by implication restrains the petitioner from giving *bona fide* publicity to the *facts* of this dispute. It is only when a so-called giving of "publicity" to "facts" amounts actually to a statement of opinions and preferences so phrased and so directed as to interfere with, influence or coerce employees in their choice of representatives that such an act can come within the terms of the injunction.

Surely the Norris-LaGuardia Act did not contemplate that courses of conduct otherwise illegal and enjoinable should become immune from equitable process merely because their doing was attended with publicity.

The petitioner next advances the argument that an injunction against it cannot be predicated upon the unlaw-

ful acts of its agents unless it has expressly authorized or ratified such acts. It bases this contention upon language contained in Sections 6 and 7 of the Norris-LaGuardia Act.

Section 6 provides that "no association or organization participating or interested in a labor dispute shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or ratification of such acts after actual knowledge thereof." It is at once apparent that this section grants no immunity from injunction to the petitioner, for the petitioner is a business corporation, organized for profit, and cannot be considered as an "association or organization."

Section 7, paragraph (a) of this statute provides that "no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof." This section, too, is inapplicable to the present case. The argument of the petitioner, based upon it, finds a complete answer in the findings of fact of the District Court. That court found in substance that the petitioner itself as a "person" had committed the unlawful acts upon which this injunction is based. This finding was approved and affirmed by the United States Circuit Court of Appeals. Thus any authorization or ratification by the petitioner is not a necessary prerequisite to the granting of an injunction.

The third provision of the statute cited by the petitioner is a portion of Section 9, and reads as follows:

> "* * * every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided herein."

The petitioner contends that this language prevents a court from granting any *mandatory* injunction in a case involving a labor dispute. This obviously is a strained interpretation of the statute. The obvious intent was to limit the *prohibition* of injunctive orders to specific acts rather than to limit the granting of *injunctions* to those merely *prohibitive* in nature.

We have considered individually above each section of the Anti-Injunction Act invoked by the petitioner. Fundamentally, however, the act as a whole cannot be applicable to this type of case. This is shown by the circumstances under which the act was passed, and the conditions which it was designed to remedy. Its enactment grew out of a controversy as to the social desirability of an increased resort to federal courts by employers seeking injunctions in cases of widespread strikes or lockouts. It was designed to restore the balance of economic power of the contending parties which was thought to have been disturbed in favor of the employers by the frequent granting of such injunctions. This is revealed in Section 2 of the act which states the policy of the United States applicable to its interpretation and

application.[1] It is to be noted that Section 1 of this act provides further that no "restraining order or temporary or permanent injunction" shall "be issued contrary to the public policy declared in this act."

By arguing that the Norris-LaGuardia Act should be interpreted as limiting the power of the courts to grant an injunction in this case, the petitioner is attributing to Congress a legislative intent which is wholly incongruous. The Virginian Railway, by concurring judgments of the lower courts, stands convicted of the commision of acts of "interference" with, "restraint or coercion" of its employees "in the designation of * * * representatives or in self-organization," acts which are not only contrary to the Railway Labor Act, but which are expressly condemned in the Norris-LaGuardia Act itself.

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[1] "In the interpretation of this Act and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are herein defined and limited, the public policy of the United States is hereby declared as follows:

"Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted. (Mar. 23, 1932, c. 90, Art. 2, 47 Stat.)"

It is unthinkable that Congress should have intended that the provisions of the Norris-LaGuardia Act be applied in such manner as to give protection to the perpetrators of the very practices which the act sought to outlaw and eliminate.

Furthermore, in order that a party may secure the immunity from injunction provided by the Anti-Injunction Act, it must appear that the party in question is a participant in a labor dispute. The petitioner, prior to its petition to this court, has insisted, first, that no dispute exists (R. 45, 46, 48), and second, that if a dispute does exist, it is not a party to it (R. 287, Assignment of Error No. 20). However this may be, the petitioner, by making the present contention has presented itself squarely to this court as being a party to a dispute with the majority of its employees contesting their right to freedom of choice of representatives. The fact that this contention is made here, whether correctly or incorrectly, should be kept in mind by the court in passing upon the general equities of the case.

Furthermore, the Norris-LaGuardia Act was never intended to apply to a situation of this sort. It was designed to deal with situations growing out of strikes or threats of strikes. As stated by the United States Circuit Court of Appeals for the 7th Circuit, in *United Electric Coal Companies vs. Rice,* 80 Fed. 2d 1, (*certiorari* denied March 2, 1936,) at page 5:

> "Confirmation of this conclusion may be found in the other sections of the act which clearly indicate that the entire act had reference to controversies over wages and conditions of employment which arise between employer and employee and

> result in strikes or threatened strikes which work hardships upon the innocent third party—the public."

Finally, even though the Anti-Injunction Act were applicable to this case, it must be remembered that it was passed in 1932, and the Railway Labor Act was passed in 1934. As we have seen, Congress intended by the latter statute to impose enforceable legal obligations. No means of enforcement has been suggested save that provided by an injunction. If the Railway Labor Act thus imposed legal obligations for the enforcement of which an injunction is the only practicable method, then to this extent it must be held to take precedence over the provisions of the earlier statute.

The case most nearly parallel to this situation is one decided by the United States Circuit Court of Appeals for the 7th Circuit, *International Alliance vs. Rex Theatre Co.*, 73 Fed. 2d, 92, where the court was confronted with this exact contention in regard to the National Industrial Recovery Act. The court said, on page 93:

> "It is quite true that section 703 (c), *supra* provides for the enforcement of the code by injunction, and if that section is in any way inconsistent with the provisions of 29 U. S. C. A. Art. 104 (3) the former will prevail as it is a later enactment." (p. 93).

Thus none of the specific sections of the Anti-Injunction Act resorted to by the petitioner can be construed as giving it the immunity from injunction which it seeks, and the act as a whole is inapplicable to this case. Its stated policy, the situation which gave rise to its enactment, and the language of its several provisions all in-

dicate that it was designed to fit an entirelly different sort of situation, that is, one involving strikes, threatened strikes, or lockouts. Finally, if it was ever applicable to such a controversy as that before this court, its provisions have been superseded by those of the Railway Labor Act which created special rights and by necessary implication a remedy by injunction to enforce them.

CONCLUSION

From and even prior to the inception of our federal government, it has been recognized that the free and uninterrupted flow of commerce among the several states is a matter of the utmost concern to the entire nation. Probably no single factor contributed more materially to the adoption of the Constitution than the realization that commerce was endangered by impediments, actual or threatened, which the individual states and their citizens were even then erecting. The power to regulate interstate commerce and the agencies by which it is carried on is inherent in our scheme of government. With the increased size and complexity of the commercial mechanism has come inevitably an increase in the number and complexity of the factors which threaten its effective operation. One by one these factors have been dealt with by federal authority as they have arisen. Problems of rates, discriminatory practices, standards of equipment, financial structure, and the like have been considered and passed upon. The human element, too, has been given appropriate attention. The personal safety of employees and their hours of service have formed the subject matter of federal statutes. The public interest with which

the commercial process is impressed and the express grant of regulatory power contained in the Constitution itself have been the foundation for a long succession of legislative and judicial precedents supporting the federal authority to meet novel problems connected with interstate commerce by appropriate remedies, and to sweep from the path of commerce those obstructions, tangible or intangible, which bar its progress or cripple it as an instrumentality of public service. This long procession of statutes and judicial decisions constitutes the legal ancestry of the act now under consideration. The Railway Labor Act recognizes facts as they exist and as they affect or are likely to affect the commercial structure. It is based on the proven hypothesis that men are as essential to the functioning of a carrier as machines or money. When men cease to work, machines and money are powerless to carry on. A grievance or an unadjusted labor dispute is as much a defect in the operating equipment of a railroad as a flaw in a locomotive or a weakness in its financial or accouting structure. Rates are no less a matter of concern to the public than the labor costs which are an important factor in determining them. Discrimination is as prejudicial to effective public service when practiced among employees as when practiced among shippers.

Recognizing all this, the Congress has sought to stabilize relations between carriers and their emeployees on a peaceful and mutually satisfactory basis. It has stated the principles and has provided the technique to accomplish that end, all to the intent that another menace to the continuity and efficiency of interstate commerce may be eliminated. The whole constitutional history of

our government supports this act as a legitimate exercise of federal power in a field of regulation well recognized and understood.

The ancestry of the act, the evil which it seeks to remedy, and the field in which it operates all indicate that it should be interpreted with a liberality in proportion to its nature and in such manner that the paramount public policy which it seeks may be completely attained.

Without more, therefore, the respondents rest their case with this court on the following propositions:

1. The Railway Labor Act (Section 2, Ninth) imposes an enforceable obligation upon carriers to "treat" with the representatives of employees certified as such by governmental authority, which is exemplified in this instance by the National Mediation Board.

2. So interpreted, it takes from the petitioner no contract right so essential or valuable as to weigh against the fundamental purpose of the statute. Hence the act is not an unreasonable or arbitrary abuse of power within the meaning of the 5th Amendment to the Constitution.

3. Considering the effect of labor disputes among all employees of carriers, and in particular among back shop employees, an act seeking to eliminate such disputes is within the commerce power granted to the Congress by the Constitution.

4. The certification of the National Mediation Board is valid,

(a) in that it properly construed the statute and determined that the choice of employees as to representatives should be determined by a majority of those who were sufficiently interested or courageous to express their opinions in an election held for that purpose; and

(b) in that it stated all the facts and conclusions of fact essential to establish its validity.

5. The power of the courts to act in this case is not limited by the provisions of the Norris-LaGuardia Act, because the petitioner has not brought itself within the provisions of the act invoked by it, because the spirit and purpose of the act indicate that it was not intended to be applied to such a situation, and because in any event the Railway Labor Act, being a subsequently enacted statute, takes precedence over it.

Respectfully submitted,

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APPENDIX I

Sections of the Railway Labor Act. (Public Act No. 442 of the 73rd Congress. — C. 691, 48 Stat. —, U. S. C., Title 45, Ch. 8, approved June 21, 1934.)

AN ACT

To amend the Railway Labor Act approved May 20, 1926, and to provide for the prompt disposition of disputes between carriers and their employees.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 1 of the Railway Labor Act is amended to read as follows:

"DEFINITIONS

"SECTION 1. When used in this Act and for the purposes of this Act—

"Fifth. The term 'employee' as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is hereby conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however,* That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized

by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this Act or by the orders of the Commission.

"Sixth. The term 'representative' means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them.

SEC. 2. Section 2 of the Railway Labor Act is amended to read as follows:

"GENERAL PURPOSES

"SEC. 2. The purposes of the Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

"GENERAL DUTIES

"First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such

agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

"Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

"Third. Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way intefere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

"Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its

employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided,* That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

"Fifth. No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this Act, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

"Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of

a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided,* (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further,* That nothing in this Act shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

"Seventh. No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

"Eighth. Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this Act, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

"Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the

requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

"Tenth. The willful failure or refusal of any carrier, its officers or agents to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction

thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000 nor more than $20,000 or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any district attorney of the United States to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: *Provided*, That nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent."

SEC. 3. Section 3 of the Railway Labor Act is amended to read as follows:

"NATIONAL BOARD OF ADJUSTMENT—GRIEVANCES—INTERPRETATION OF AGREEMENTS

"Sec. 3. First. There is hereby established a Board, to be known as the 'National Railroad Adjustment Board,' the members of which shall be selected within

thirty days after approval of this Act, and it is hereby provided—

"(a) That the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 2 of this Act.

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

"(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

"(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known

as 'referee,' to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this Act for the appointment of arbitrators and shall fix and pay the compensation of such referees.

"(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

"(n) A majority vote of all members of the division of the Adjustment Board shall be competent to make an award with respect to any dispute submitted to it.

"(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the em-

ployee the sum to which he is entitled under the award on or before a day named.

"(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be *prima facie* evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

"(q) All actions at law based upon the provisions of this section shall be begun within two years from the

time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

"Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this Act, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board."

SEC. 5. Section 5 of the Railway Labor Act is amended to read as follows:

"FUNCTIONS OF MEDIATION BOARD

"SEC. 5. First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

"(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

"(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

"The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

"In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 10 of this Act) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

"If arbitration at the request of the Board shall be refused by one or both parties the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

"Second. In any case in which a controversy arises over the meaning or the application of any agreement reached through mediation under the provisions of this Act, either party to the said agreement, or both, may apply to the Mediation Board for an interpretation of the meaning or application of such agreement. The said Board shall upon receipt of such request notify the parties to the controversy, and after a hearing of both sides give its interpretation within thirty days.

"(e) Within sixty days after the approval of this Act every carrier shall file with the Mediation Board a copy of each contract with its employees in effect on the

1st day of April, 1934, covering rates of pay, rules, and working conditions. If no contract with any craft or class of its employees has been entered into, the carrier shall file with the Mediation Board a statement of that fact including also a statement of the rates of pay, rules, and working conditions applicable in dealing with such craft or class. When any new contract is executed or change is made in an existing contract with any class or craft of its employees covering rates of pay, rules, or working conditions, or in those rates of pay, rules, and working conditions of employees not covered by contract, the carrier shall file the same with the Mediation Board within thirty days after such new contract or change in existing contract has been executed or rates of pay, rules, and working conditions have been made effective.

SEC. 6. Section 6 of the Railway Labor Act is amended to read as follows:

"SEC. 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as re-

quired by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

SEC. 8. It any section, subsection, sentence, clause, or phrase of this Act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this Act. All Acts or parts of Acts inconsistent with the provisions of this Act are hereby repealed.

Approved, June 21, 1934.

APPENDIX II

Sections of Norris-LaGuardia Act

Sec. 1. No court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this Act; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act. (Mar. 23, 1932, C. 90, Art. 1, 47 Stat. U. S. C. Title 29, Sec. 101.)

Sec. 2. In the interpretation of this Act and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are herein defined and limited, the public policy of the United States is hereby declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organiza-

tion or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted. (Mar. 23, 1932, C. 90, Art. 2, 47 Stat. U. S. C. Title 29, Sec. 102.)

Sec. 6. No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or ratification of such acts after actual knowledge thereof. (Mar. 23, 1932, C. 90, Art. 6, 47 Stat. U. S. C. Title 29, Sec. 106.)

Sec. 7. No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or

actually authorizing or ratifying the same after actual knowledge thereof:

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection. * * * (Mar. 23, 1932, C. 90, Art. 7, 47 Stat. U. S. C. Title 29, Sec. 107.)

Sec. 9. No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order of injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided herein. (Mar. 23, 1932, C. 90, Art. 9, 47 Stat. U. S. C. Title 29, Sec. 109.)

FILED
FEB 3 1937
CHARLES ELMORE CROPLEY

No. 324

In the Supreme Court of the United States

OCTOBER TERM, 1936

THE VIRGINIAN RAILWAY COMPANY, PETITIONER

v.

SYSTEM FEDERATION NO. 40, RAILWAY EMPLOYEES DEPARTMENT OF AMERICAN FEDERATION OF LABOR, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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OPINIONS BELOW

The opinion of the District Court for the Eastern District of Virginia (R. 254–279) is reported in 11 F. Supp. 621. The opinion of the United States Circuit Court of Appeals for the Fourth Circuit (R. 311–339) is reported in 84 F. (2d) 641.

JURISDICTION

The decree of the Circuit Court of Appeals (R. 340) was entered on June 18, 1936. The petition for certiorari was filed August 31, 1936, and

granted on October 12, 1936. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The following questions will be discussed in this brief:

I. Is the application of the Railway Labor Act, as amended on June 21, 1934, to back-shop workers on the Virginian Railway in violation of the commerce clause?

II. Is the Railway Labor Act invalid *in toto* on the grounds: (1) that it applies to some employees not subject to the commerce power, and (2) that it is inseparable?

III. Does the Railway Labor Act as amended impose a legally enforceable obligation on carriers to "treat with" the representatives selected by the majority of the employees in a craft or class as the representatives of the craft or class?

IV. If so, is the requirement in violation of the due process clause of the Fifth Amendment?

V. Does the Norris-La Guardia Act (47 Stat. 70, U. S. C., Tit. 29, §§ 101–115) prohibit the granting of the injunction issued by the courts below?

The following questions presented by the case are not considered in this brief but are left to the consideration of counsel for the respective parties:

VI. May the National Mediation Board, in elections held to determine the representation of a

craft or class under Section 2, Paragraph Ninth, of the Railway Labor Act, as amended, certify as the representative of a craft the organization receiving the majority of the votes cast but not a majority of all those qualified to vote, where a majority of the eligible voters participate in the election?

VII. Whether the certification of the National Mediation Board contains adequate findings.

STATUTES INVOLVED

The provisions of the Railway Labor Act of May 20, 1926, c. 347, 44 Stat. 577, as amended by the Act of June 21, 1934, c. 691, 48 Stat. 1185, U. S. C. Tit. 45, §§ 151–163, are set forth *in toto* in the Appendix, the changes in the Act of 1926 made by the 1934 amendments being indicated.

STATEMENT

The Government will not undertake to formulate any detailed statement of the facts such as is contained in the briefs filed by petitioner and respondent, but will refer the Court to the statement of facts in the opinion of the District Court (R. 254–270).

This suit was instituted by the respondents, a labor organization representing the shop craft employees on the Virginian Railway, and various individual officers and members thereof, (1) to compel the petitioner to treat with it, and (2) to restrain petitioner from interfering with or influencing, intimidating or coercing its shop craft em-

ployees in their free choice of representatives, and from promoting, fostering or encouraging certain so-called company unions or entering into agreements with such unions with respect to such employees. (R. 29–30.)

The mechanical department employees of the petitioner had since 1922 been represented by the Mechanical Department Association of the Virginian Railway, an organization formed and dominated by the carrier. (R. 255, 256, 278, 281.) The respondent, System Federation No. 40, an organization affiliated with the American Federation of Labor and composed of the six shop crafts on the Virginian Railway, claimed in 1934 that the majority of the mechanical department employees of the petitioner desired to be represented by it. (R. 256.) The Association and the Railway disputed this claim. (R. 31, 256, 257.) Respondent thereupon asked the National Mediation Board to conduct an election by secret ballot to determine the choice of representatives. (R. 257.)

In an election held by the Mediation Board, pursuant to the provisions of Paragraph Ninth of Section 2 of the Act, among the six crafts of employees in the mechanical department of petitioner, the respondent received a majority of the votes cast in each of the six crafts, and the Mechanical Department Association a small minority. (R 263.) In four of the six crafts—the sheet metal workers, the machinists, the electrical workers, and the

boiler makers—a majority of all the eligible voters favored the respondent Federation. (R. 263.) A majority of the craft of blacksmiths participated in the election, but the Federation received less than a majority of the total eligible vote.[1] Less than a majority of those qualified to vote in the craft of carmen and coach cleaners participated in the election.[2] The National Mediation Board certified to the petitioner that System Federation No. 40 was the duly designated representative of the six shop crafts in the Mechanical Department. (R. 13.) Respondent then demanded that the petitioner treat with it as the representative of the Mechanical Department employees for the purposes of the Act. The petitioner refused to do so. (R. 143, 265.) Thereupon respondent instituted this suit to compel petitioner to treat with it.

In their bill respondents also alleged that petitioner was interfering with and influencing its employees' choice of representatives by encouraging them to join the Association, as well as the Independent Shop Craft Association, another union subsequently organized by petitioner (R. 8–11, 18–25), and discouraging affiliation with the respondent, in violation of Paragraphs Third and Fourth of

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[1] The Federation received 22 and the Association 8 out of 46 eligible votes. (R. 263.)

[2] The Federation received 98 and the Association 20 out of 266 eligible votes. (R. 263.)

Section 2. The respondents asked that petitioner be enjoined from continuing its efforts to force its employees to join company unions rather than the Federation. (R. 29.)

After a trial, the District Court found as fact that petitioner had refused to treat with respondents, and that the charges of interference, influence and coercion were well founded. (R. 281–282, 277–278, 265–266.) The court also held that the Railway Labor Act was constitutional as applied to the back-shop employees of petitioner (R. 269–274), that the certification was valid as to the five crafts in which a majority of the qualified voters participated in the election (but not as to the craft of carmen) (R. 266–267), that the Act authorized the granting of injunctive relief (R. 274–276), and that the provisions of the Norris-LaGuardia Act relating to the issuance of injunctions in labor disputes had been complied with (R. 276–278). The court granted the relief prayed for by respondent, except that it did not require petitioner to treat with the representatives of the carmen. (R. 280–283.) Respondents have not appealed from the ruling as to the carmen.

On appeal, the Circuit Court of Appeals carefully reviewed all of the questions passed upon by the District Court (except the ruling as to the carmen) and affirmed the decision below.

Other facts necessarily involved in the determination of the issues discussed in this brief will be stated in the argument.

SUMMARY OF ARGUMENT

I

The Railway Labor Act may constitutionally be applied to cover persons employed in the back-shops of a carrier even though such persons are not themselves engaged *in* interstate commerce. This Court has already upheld the validity of the Railway Labor Act as applied to clerks, whose work is obviously intrastate in nature. *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548. The purpose of the Act was to prevent strikes which threatened the service of the necessary agencies of interstate transportation. Labor disputes between carriers and their shop employees would both endanger the safety of interstate transportation and directly obstruct its movement. Moreover, a dispute between a carrier and its back-shop employees would necessarily be communicated to employees engaged in interstate commerce, inasmuch as the mechanical department of a carrier, which includes both back-shop employees and those engaged in making running repairs, is operated and organized as a unit. The principle of *The Employers Liability Cases,* 207 U. S. 463, does not apply here; although interstate commerce might not be affected at all by the rule of liability applicable to shopmen's injuries, it would be directly obstructed if shopmen ceased to work and if railroad equipment was not repaired.

II

Petitioner claims that the statute is entirely invalid, because it applies to some employees engaged in purely intrastate activity. It is doubtful whether there are any railroad employees whose work is not essential to the effective functioning of the transportation system or as to whom it might not be said that labor disputes between them and their employees would interfere with interstate commerce. But if it be assumed that there is a small proportion of employees as to whom the Act could not constitutionally be applied, it is clear that Congress would have intended the Act to stand as to the remainder. That is, Congress would have preferred to have the Act operate so as to prevent a large proportion of railway labor disputes rather than to have the Act declared entirely void. The *Texas & New Orleans* case is, of course, inconsistent with the view that the statute is completely invalid.

III

The decree requires both that the petitioner treat with the respondent Federation (hereafter referred to as the affirmative obligation), and that petitioner refrain from entering into collective labor agreements with anyone but the respondent (hereafter referred to as the negative obligation). It does not require petitioner to enter into any contract with the respondent, establish a closed shop, in any way interfere with the exercise of petition-

er's right to select or discharge its employees, or prevent individual or minority groups from presenting grievances to the management. Such a decree is authorized by Subdivisions First, Second, Third, Fourth, and Ninth of Section 2 of the statute.

Petitioner does not challenge the enforceability or legality of Subdivisions Third and Fourth of Section 2, which together form one of the alternative statutory bases for the second or negative paragraph of the decree. See pages 11–12, *infra*. But petitioner claims that the affirmative duty imposed upon carriers to treat with the representatives of their employees is not enforceable. A review of the history and context of these sections, however, shows that Congress intended the obligations imposed by Paragraphs First, Second and Ninth of Section 2 to be both mandatory and enforceable. The provisions are phrased in mandatory language. They are ancillary to and inextricably intertwined with other statutory provisions which are admittedly legally enforceable. The binding character of the obligation imposed by these paragraphs will clearly appear from examples of how they fit into the statutory scheme. They relate to the use of the conference procedure for settling disputes. By Section 2, Eighth of the Act, which is criminally enforceable, carriers are required to post notices stating that they will comply with the statutory procedure in settling labor

disputes. Section 2, Seventh and Section 6, which are also criminally enforceable, require that conferences be held in advance of any change in rates of pay, rules, or working conditions. These provisions make it plain that the obligation to hold conferences was not intended to be precatory.

Moreover, as the legislative history shows, the purpose of the 1934 amendments to the Railway Labor Act was to strengthen the original 1926 Act and make it more enforceable. The 1934 amendments were enacted partly because some carriers had refused to deal with representatives chosen by a majority of their employees. Such carriers insisted upon recognizing other organizations with which they preferred to treat, even though such organizations did not represent a majority of the employees. Section 2, Ninth, also added in 1934, was designed to meet this particular evil through the medium of a secret election and a requirement that the carrier treat with the representative chosen.

Enforcement of Paragraphs First, Second, and Ninth of Section 2 is entirely consistent with and *in fact essential* to the success of the statutory plan for amicable settlement of disputes through conferences between representatives of the parties. The purpose and effect of these provisions is to require carriers and their employees to use the machinery established by the Act for the attainment of industrial peace; it does not change the basic principles of the Act, which recognize that

peace can be achieved only through conferences and voluntary agreements.

Petitioner suggests that the affirmative obligation that a carrier treat with the representative of its employees is not subject to enforcement in a court of equity. But there is no inherent difficulty in the way of equitable enforcement of the statutory requirement that carriers confer with the representatives of their employees. As has been pointed out, the statute does not attempt to compel agreement, and the decree only requires the carrier to meet representatives of employees in conference.

The negative requirement in the decree that petitioner refrain from entering into collective labor agreements except with respondent may be regarded as one way in which a court of equity enforces the affirmative statutory obligation. Or it may rest upon the negative statutory obligations included in Section 2, Second and Ninth. These paragraphs and complementary parts of the statute not only express an affirmative duty to treat with duly designated representatives of employees but also imply a negative duty not to treat with any one else as to rates of pay, rules, or working conditions. Thus the negative part of the decree may be in execution of these paragraphs. Or it may be in execution of Paragraphs Third and Fourth, which are unquestionably enforceable. *Texas & New Orleans R. Co.* v. *Brotherhood of*

Railway Clerks, supra. Paragraphs Third and Fourth prohibit a carrier from interfering with or influencing its employees in their selection of representatives. Petitioner was attempting to force company unions upon its employees, and the making of agreements with such organizations, which did not in fact represent the majority of the Mechanical Department employees, constituted a method of influencing and interfering with the employees in the free choice of representatives. The Court below was fully warranted in prohibiting this practice, in order to protect the employees' right to choose their own representatives.

IV

The affirmative obligation that petitioner confer with the representatives of its employees and attempt to settle disputes amicably in conference can not be regarded as depriving petitioner of liberty or property in violation of the Fifth Amendment since the obligation is merely to confer, not necessarily to contract. Moreover, if such a requirement were deemed to interfere with petitioner's property or contract rights, it would be entirely reasonable as a necessary and important part of the machinery for the prevention of railway labor disputes. Every portion of the statutory plan ultimately depends for its success on the willingness of carriers to confer with the representatives of their employees.

The negative obligation does not in fact deprive carriers of liberty of contract, inasmuch as the

practice of carriers is not to contract with individual employees or with minorities. They establish, either through unilateral announcement, or a bilateral agreement with one organization representing the employees in a craft or class, the rates of pay, rules and working conditions applicable to the class or craft. It would be extremely impracticable for a carrier to have minority groups of employees working under different rules than the majority, and neither petitioner nor other carriers exercise their purely theoretical privilege of contracting with more than one representative of a single class of employees.

In any event, the prohibition against contracts with minority groups is reasonable and necessary if railway labor disputes are to be prevented. The effectiveness of the machinery of the Act is posited upon agreement between representatives of employers and employees, and cannot be achieved by conflicting conferences between a carrier and numerous representatives of individual employees or minority groups working at cross purposes. Any attempt by a carrier to maintain two or more contracts applying to persons doing the same work, with standards necessarily discriminating against one group or another, would result in discord and dissatisfaction and make labor disputes inevitable.

In recognizing the power of a carrier to join with the representatives selected by a majority of the craft in making a purely civil contract (to which no penal sanctions are attached) which

covers the whole craft, the Railway Labor Act does not involve any delegation of legislative power. The doctrine of *Carter* v. *Carter Coal Company*, 298 U. S. 238, is therefore inapplicable.

V

Petitioner's claim that the injunction below violates Sections 4 (e), 6, 7 (a) and 9 of the Norris-LaGuardia Anti-Injunction Act is obviously unsupported by the language of the sections to which petitioner refers. Moreover, if there were an inconsistency, the Railway Labor Act, which was enacted subsequent to the Norris-LaGuardia Act and which deals with the specific problem at bar, would, under familiar canons of statutory construction, prevail.

ARGUMENT

I

THE APPLICATION OF THE RAILWAY LABOR ACT TO BACK-SHOP EMPLOYEES IS WITHIN THE COMMERCE POWER

The Mechanical Department employees on the Virginian and other railways are those engaged in repairing cars and locomotives. Such repair work consists of the light or "running" repairs, made (generally in roundhouses or yards) without withdrawing the equipment from service, and the heavy or "classified" repairs made in the back shops. To make classified repairs on the Virginian, the cars and engines are withdrawn from service

for an average time of about 105 days for locomotives and 109 days for cars.[3] (R. 269.)

The Mechanical Department employees are generally divided into six crafts, the sheet metal workers, the carmen and coach cleaners, the machinists, the blacksmiths, the electrical workers, and the boilermakers. (R. 263.)[4] Each craft is composed of both those employees making running repairs and those working in the back shops. The Mechanical Department Association of the Virginian Railway (the company union) claimed to represent employees doing both sorts of work.[5] Accordingly, when a dispute arose on the Virginian as to who was the representative of the Mechanical Department employees, the contesting organizations—the Federation and the Association—agreed that the list of eligible voters should comprise all of the employees, including those working in the back shops. (Complainant's Ex. 3, printed as Ex.

[3] This does not mean that the repairs took 105 or 109 days, which included the time the equipment was in the shops awaiting repair. A general overhauling of a locomotive does not take nearly that long. See *Industrial Accident Commission* v. *Davis*, 259 U. S. 182.

[4] See First Annual Report of the National Mediation Board (for the year ending June 30, 1935) Table VIII, p. 36. This does not mean that all six crafts may not be represented by a single organization if the majority in each craft so choose.

[5] The agreement between the Association and the Railway applied to all Mechanical Department employees, whether engaged in running or classified repairs. See Def. Ex. R, R. 244, 245, not printed in full in the record. See note 10, *infra*.

A to the Bill of Complaint. R. 31–33.) The number of eligible voters in the six crafts combined was 824. (R. 263.) Of this number, 322 were engaged in making classified repairs in the back shops at Princeton, West Virginia. (R. 269.)[6] The remaining Mechanical Department employees, including 20 at Princeton, were engaged in making running repairs.

Petitioner claims that these 322 men working in the Princeton shop are not subject to the commerce power, and that therefore the election in which those men were permitted to vote[7] and the certification under the Railway Labor Act applying to them as well as to the employees making running repairs are illegal and void.

The Government does not claim that these backshop employees are engaged *in* interstate commerce. But the power of Congress over the railroads engaged in interstate transportation is not limited to the regulation of those transactions which are themselves interstate. *Baltimore & Ohio R. Co.* v. *Interstate Commerce Commission,* 221 U. S. 612; *Southern Ry. Co.* v. *United States,* 222 U. S. 20; *Houston E. & W. Texas Ry. Co.* v. *United States,* 234 U. S. 342; *The Minnesota Rate Cases,* 230 U. S. 352; *Railroad Commission of Wis-*

[6] Until 1926, when the road was electrified, Princeton was a division point, and running repairs were also made there. (R. 177.)

[7] No separate tabulation was made of the votes of the employees making running and classified repairs.

consin v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563; *Schechter Poultry Corporation* v. *United States*, 295 U. S. 495, 544. In the *Schechter* case the Court stated:

> The power of Congress extends not only to the regulation of transactions which are part of interstate commerce, but to the protection of that commerce from injury. *It matters not that the injury may be due to the conduct of those engaged in intrastate operations.* Thus, Congress may protect the safety of those employed in interstate transportation "no matter what may be the source of the dangers which threaten it." *Southern Ry. Co.* v. *United States*, 222 U. S. 20, 27. We said in *Second Employers' Liability Cases*, 223 U. S. 1, 51, that it is the "effect upon interstate commerce", not "the source of the injury", which is "the criterion of congressional power." We have held that, in dealing with common carriers engaged in both interstate and intrastate commerce, the dominant authority of Congress necessarily embraces the right to control their intrastate operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to secure the freedom of that traffic from interference or unjust discrimination and to promote the efficiency of the interstate service. The *Shreveport Case*, 234 U. S. 342, 351, 352; *Wisconsin Railroad Comm'n* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563, 588. [Italics supplied.]

The purpose of the Railway Labor Act is to prevent labor disputes and strikes "which threaten the service of the necessary agencies of interstate transportation." *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548, 570. In order to accomplish this purpose, the Act must be applied to all railroad employees whose work is essential to the performance of the transportation service. If a cessation of work will prevent the safe and uninterrupted movement of trains, it will directly interfere with interstate commerce, regardless of whether the striking employees are themselves engaged in interstate commerce or not.

There can be no doubt that the mechanical department of a railroad is essential to its operations. Railroads must keep engines and cars in condition. They cannot engage in transportation without having their equipment repaired. The equipment is in continuous need of repair. Often light repairs in roundhouses or yards are sufficient, but in the course of time all cars and engines must be overhauled and heavy repairs made if railroad transportation is to be safely and efficiently carried on. The repair departments, including the shops, are integral parts of every transportation system.[8]

A strike among back-shop employees would immediately and substantially interfere with the ef-

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[8] The record in *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, reveals that in 1934 there were 86,493 employees engaged in the back shops on the Class I railroads. (See 295 U. S. at 388.)

fective operation of any railroad. The equipment under repair in the shops could not be returned to the lines. The equipment which was kept in service would, as it came in need of repair, endanger the safety of interstate transportation. If the strike was not quickly brought to a close, the movement of trains might soon be prevented for lack of safe equipment.[9]

The relationship between the back-shop employees and those engaged in making running repairs suggests another reason why labor disputes involving the former would interfere directly with the running of trains. On each railroad, as on the Virginian, each craft of employees engaged in repair work is represented by one labor organization; in the negotiation of labor disputes no distinction is made between those repair men who work in the shops and those who work in roundhouses or yards.

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[9] The trial court found (R. 270):

"It will also be seen from the evidence that when these shops are in operation at approximately their full capacity, there is, so to speak, a stream of engines and cars passing through them, out of and back into interstate transportation activity. And while it is true that engines and cars repaired or rebuilt there are frequently out of service for comparatively long periods (the average being 105 and 109 days, respectively) I have no serious doubt that if the operations in the shop were suspended by a labor dispute for any considerable length of time, the interstate transportation service of the Railway would be seriously hampered or interrupted and if the suspension in the shops continued very long that such interruption would very seriously cripple its interstate transportation operations."

As has been pointed out, all of the Mechanical Department employees on the Virginian Railway are covered by a single labor agreement.[10] Under this agreement, which can be regarded as typical, employees regularly assigned to the shops are subject to call for emergency work on the line. (Rule 8 (a).) The seniority rules, which give preference to the employees longest in service, establish separate seniority lists for crafts or subdivisions of a craft, but do not distinguish between employees making running and classified repairs. (Rule 28 (a).) Thus if the force is being reduced or increased, back-shop employees may exercise their seniority rights to replace men engaged in running repair work, and vice versa. Apprentices to the mechanical trades, of whom there is to be one for every four mechanics, may be transferred from point to point on the railroad—indiscriminately between running repairs and the back-shops—so as to "secure a complete knowledge of the trade." (Rule 36 (f, g).)

It is plain from the above illustrations that although at any given time some employees may be assigned to heavy and some to light repair work, the mechanical department employees of a carrier

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[10] The agreement was introduced in evidence as Defendant's Exhibit R (R. 244), but was not printed in full in the record. It has been filed in this Court as an original exhibit certified by the District Court, pursuant to Rule 10, Paragraph 5.

are regarded as a unit with interchangeable duties and assignments.[11] A dispute between a carrier and any of such employees would be handled by the organization representing all of them under the agreement applying to all of them. In the event that a dispute was not settled amicably, a strike or lockout would affect back-shop and other employees without distinction. The conclusion of the Circuit Court of Appeals (R. 324) that a labor controversy with the back-shop employees would almost necessarily be communicated to the employees engaged in interstate transportation does not seem open to challenge.[12]

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[11] The detailed classification of railroad employees by the Interstate Commerce Commission makes no differentiation between mechanical department employees assigned to running repairs and those assigned to back shops. See Interstate Commerce Commission, Order of April 18, 1921, classifying railroad employees.

[12] The Circuit Court of Appeals found (R. 324–325): "For the machinery thus provided to be effective, it must apply to all of the employees of an interstate carrier; for not only would it not be practicable to establish separate organizations for bargaining among the employees engaged in interstate commerce as distinguished from those who are not, but disturbances among the latter would inevitably disturb the interstate business of the carrier and would almost necessarily be communicated to the employees engaged in interstate transportation. The defendant, for example, employs machinists engaged strictly in interstate commerce as well as those who are employed in back shop work. It would be out of the question for it to bargain with the former and not with the latter; and, even if this were possible, a labor controversy with those involved in back shop work would be communicated to the others * * *."

Experience in the nationwide shopmen's strike of 1922 illustrates both the probability that the shopmen making both running and classified repairs will be involved in the same labor dispute and the obvious fact that a strike by railroad shopmen directly interferes with interstate commerce. In that strike all of the shopmen on the railroads of the country went on strike. The strike was held to constitute a direct and major interference with interstate commerce (*United States* v. *Railway Employees' Department, American Federation of Labor,* 283 Fed. 479, 290 Fed. 978, N. D. Ill.),[13]

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[13] The effect of the shopmen's strike was described by the District Court as follows (290 Fed., at 981):

"As to the damage inflicted upon the railroads by the strike, the evidence shows that the total cost of the strike on the 50 railroads from which testimony was adduced, amounted to more than $96,000,000. This represents only money actually paid out on account of the strike, and does not include damages to property, loss of business incurred, increased cost of doing business, nor loss by claims for damages. * * * The 50 railroads from which proof was taken had in their employ on the 1st of July, 1922, prior to the strike order becoming effective, approximately 277,000 shopmen. Of this number, more than 90 per cent. in every instance responded to the strike call. In some cases, the number of those answering the call was as high as 98 per cent.

"The general effect of the strike on the performance and operations of the fifty railroads from which testimony was adduced, was to increase delays of freight, passenger, and mail service approximately 50 per cent. The general effect of the strike on the motive power of the 50 railroads from which proof was furnished was to bring about a general breakdown and deterioration of motive power, resulting in the consumption of such surplus motive power as those rail-

and the Virginian Railway itself sought and obtained an injunction against the interference with interstate commerce caused by the strike on its lines (R. 44).

Petitioner urges that although the Railway *does* perform its own classified repair work, it *could* contract with outside firms, such as the Virginia Bridge and Iron Works and the Baldwin Locomotive Works to perform the repairs.[14] Under such circumstances, it is argued, a strike among the back shopmen would not interfere with interstate transportation. But neither petitioner nor other railroads are in practice willing to rely on outside firms for the repair of their equipment, and the

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roads had on the 1st of July, 1922, and in the inability on the part of most of those roads to perform any back shop repairs during the early months of the strike, and in limiting repairs from then on.

"The general effect of the strike on business and industry of the country, as evidenced by the testimony of 53 representatives of leading business concerns of the country, was a general disturbance, slowing down of production, reduction of volume, loss of customers, and monetary losses due to delays on the part of business houses in receiving and obtaining raw materials, and in shipping and transporting finished products. The effect of the strike on the United States Postal Department, as evidenced by the certificate of the Postmaster General, was the discontinuance of 706 trains carrying United States mail, operating over a total of 39,716 miles. As a result of this, 462 United States post offices, serving a population of 352,671 people, were without mail service."

[14] The Virginian has had "some types" of work performed by the Virginia Bridge and Iron Works, and has "had work done" by the Baldwin Locomotive Works. (R. 178.)

general course of business in the industry is in itself the strongest evidence that a railroad needs its own shops if it is to operate efficiently. The cost of having outside companies make substantial repairs on equipment, which has been proved to be excessive,[15] would in itself impose a heavy burden upon the interstate transportation system. The argument that in case of a strike all the heavy repair work could be performed by independent contractors also overlooks the fact that the em-

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[15] In a series of investigations between 1921 and 1925, the Interstate Commerce Commission studied the cost to certain carriers of having repairs to locomotives and cars made under contracts with outside firms, such as the Baldwin Locomotive Works and the American Locomotive Company. See *Construction and Repair of Railway Equipment: Pennsylvania R. Co.*, 66 I. C. C. 694; *Id.: Atlantic Coast Line R. Co.*, 66 I. C. C. 727; *Id.: New York Central R. Co.*, 66 I. C. C. 732; *Id.: Chicago & N. W. Ry. Co.*, 69 I. C. C. 143; *Id.: Seaboard Airline Ry. Co.*, 69 I. C. C. 151; *Id.: Central R. Co. of New Jersey*, 89 I. C. C. 751, 104 I. C. C. 352; *Id.: Various Railway Companies*, 91 I. C. C. 399; *Id.: Erie R. Co.*, 93 I. C. C. 646; *Id.: New York, New Haven and Hartford R. Co.*, 107 I. C. C. 721. In each case the carrier explained that the contracts had been made because of lack of capacity, for one reason or another, to perform the work in its own shops. In every instance the Commission found the cost much greater than it would have been in the carrier's own shops, although in some cases the extra expense was found justified by such emergencies as the 1922 shopmen's strike. These reports of the Commission demonstrate that the practice of making such contracts with outside firms is not conducive to the economical operation of the railroads. The following table indicates the findings of the Commission, with respect to some of the more important carriers investigated, as to the approxi-

ployees engaged in running repairs, represented by the same organization, would invariably be parties to the same dispute, and that the running repairs could not be made except by the carrier itself. The trial court properly found that (R. 270–271):

> The effort of the Railway to show that these shops are not necessary to the conduct of its transportation activities was not impressive. While the operation of the shops by the Railway is not absolutely necessary, for the reason that the Railway could probably have the work, in large part at least, done by independent contractors, it has neverthe-

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mate average cost to the carrier of repairs of the same equipment in the carriers' own shops and in the shops of outside companies.

Name of carrier	Cost in carriers' own shops	Cost under contracts with outside firms	Citation
Pennsylvania R. Co.	$9,000	$21,000–$25,000	66 I. C. C. at 697.
New York Central R. Co.	$6,000	$21,900	66 I. C. C. at 741.
Seaboard Air Line Ry. Co.	$7,700	$16,300	69 I. C. C. at 157.
Erie R. Co.:			
Locomotives	$2,000–$8,000 (average 100%).	$8,000 – $64,000 (average 438%).	93 I. C. C. at 653.
Cars	$227	$962	93 I. C. C. at 657.
New York, New Haven & Hartford R. Co.	Average 100%	Average 237%	107 I. C. C. at 725.

In these investigations, the Erie, the New Haven, and the Central Railroad of New Jersey explained that the 1922 shop strike had forced them to have their equipment repaired by outside firms. The tremendous burden which a shop strike imposes upon carriers, even though they succeed in having their repairs made by other companies, is demonstrated by the above figures.

> less chosen to do the work in its own shops, which is the only practical method of keeping such important operations under its immediate control. In that way it avoids the chances of being embarrassed by delays and other troubles beyond its control and the consequent danger of interruption of its transportation business.

Petitioner contends further that the repair work in the back shops is a purely local activity similar to manufacturing [16] and mining, inasmuch as the same work *could* be performed by independent concerns not engaged in transportation. But the mechanical department of a railroad is an integral part of the *railroad,* and is obviously more closely related to interstate transportation than mines or factories or even independent companies doing similar work.

The validity of the Railway Labor Act, as applied to railroad employees engaged in intrastate activity, would seem to have been determined by this Court in *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548, 570. The Court there upheld the Railway Labor Act as applying to the *accounting and clerical* forces of a

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[16] Petitioner defines "manufacture" as "transformation—the fashioning of raw materials into a change of form for use." (Pet. Br. p. 44.) Repair work is obviously neither "transformation" nor "manufacture." A garage in which automobiles are repaired is not regarded as an automobile factory.

railroad—employees obviously engaged in intrastate activity.[17] Counsel for the railroad in that case did not rely on the intrastate nature of the work performed by the clerical employees, and the Court did not directly pass upon the point in its opinion. But counsel did assert the invalidity of the Act under the Commerce Clause. This Court, however, entertained "no doubt of the constitutional authority of Congress to enact the prohibition. * * * Congress may facilitate the amicable settlement of disputes which threaten the service of necessary agencies of interstate transportation."

Petitioner relies on the first *Employers' Liability Cases*, 207 U. S. 463, and on cases arising under the Second Employers' Liability Act. *New York, New Haven and Hartford Railroad Co.* v. *Bezue*, 284 U. S. 415; *Industrial Accident Commission* v. *Davis*, 259 U. S. 182; *Minneapolis & St. Louis R. Co.* v. *Winters*, 242 U. S. 353. These cases relate to an entirely different problem, and are clearly distinguishable from the case at bar. The Employers' Liability Acts regulate the rule of liability applying to injuries to railroad employees. The

[17] The record in that case discloses that the employees involved consisted in the main of clerical machine operators, office and file clerks, accountants, bookkeepers, storage room clerks, station and yard clerks, secretaries, janitors, messengers, and telephone operators. (See U. S. Supreme Court, Oct. Term, 1929, No. 469, R. 507–508, 145, 421, 858, 1088.)

absence of such federal regulation applying to injuries suffered by shop employees or others not engaged in interstate commerce would not interfere with interstate transportation in any way. But although interstate commerce might not be affected at all by the rule of liability applicable to the injuries of shopmen, it is directly affected and will suffer if shopmen cease to work and if railroad equipment is not repaired. The purpose of the Railway Labor Act is to prevent interruptions to interstate transportation. If this goal is to be achieved, the commerce power must permit such regulation as will prevent labor disputes among shop employees—even though it might not include the power to prescribe the rules of liability for injuries to the same men.

The cases cited arising under the Second Employers' Liability Act, which hold that shopmen are not engaged in interstate commerce, do not purport to limit the power of Congress.[18] The Court has made it plain that the decisions under that statute holding particular employees not to be engaged in interstate commerce "are based upon the limitations of that statute and do not define the scope of constitutional authority as to employees of interstate carriers." Dissenting opinion in *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, 389; *Illinois Central R. Co.* v. *Behrens*,

[18] Petitioner admits that these cases are "not controlling on the question at issue". (Pet. Br., p. 42.)

233 U. S. 473, 477; *Chicago & Northwestern Ry Co.* v. *Bolle*, 284 U. S. 74, 78.

It is true that there is a dictum in the first *Employers' Liability Cases* indicating that "shops for repairs" were not regarded as within the Federal commerce power.[19] But the Court in that case did not have before it, and was not concerned with, the question of whether labor disputes with shop employees might directly interfere with interstate transportation. As this Court has frequently declared:

> It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is pre-

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[19] The language referred to is as follows (207 U. S. at 498):

* * * a few illustrations showing the operation of the statute as to matters wholly independent of interstate commerce will serve to make clear the extent of the power which is exerted by the statute. Take a railroad engaged in interstate commerce, having a purely local branch operated wholly within a State. Take again the same road having *shops for repairs*, and it may be, for construction work, *as well as a large accounting and clerical force*, and having, it may be, storage elevators and warehouses, not to suggest besides, the possibility of its being engaged in other independent enterprises.

* * * * *

As the act thus includes many subjects wholly beyond the power to regulate commerce * * *. [Italics supplied.]

> sented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

Cohens v. *Virginia*, 6 Wheat. 264, 399; *Humphrey's Executor* v. *United States*, 295 U. S. 602, 627.

The dictum in the *Employers' Liability Cases* classifies repair shops and the "accounting and clerical force" together as beyond the regulatory power of Congress. And yet in the *Texas and New Orleans* case the application of the Railway Labor Act to accounting and clerical employees was sustained. Despite its silence on this question, the reasoning in that opinion would seem conclusively to establish the validity of the Railway Labor Act as applied to railway employees not themselves engaged in interstate commerce.[20]

II

The Railway Labor Act is Not Invalid *in Toto* Because it May Apply to Some Employees Not Within the Federal Power

Petitioner urges that the Railway Labor Act is unconstitutional *in toto* because it may apply to

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[20] See also the dissenting opinion of the Chief Justice in *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, 388.

some railroad employees engaged in activities not subject to federal regulation. The contention is that the Act is inseparable and, therefore, wholly invalid.

Section 1 of the Act defines "employee" so as to bring within the Act all persons performing any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect or as subsequently amended.[21] The order of the Interstate Commerce Commission defining "employee" is that of April 18, 1921 (quoted on p. 39 of Pet. Br.), which lists and classifies all the employees of carriers for purposes of filing reports with the Commission.[22] This order has not been modified in any particular material to the present case. Thus under this order the Railway Labor Act now applies to all railway employees.

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[21] The definition of "employee" in Section 1 of the Act is as follows:

"The term 'employee' as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is hereby conferred upon it to enter orders amending or interpreting such existing orders * * *."

[22] In other orders not material here, the Commission has defined "subordinate official" so as to distinguish superior officers from such officials. See Order of February 5, 1924, *Ex parte* 72.

The *Texas & New Orleans* case makes it plain that the Railway Labor Act may constitutionally be applied to all employees whose work is essential to an efficient and safe transportation service in order that the Act may achieve its purpose of preventing labor disputes which might interrupt such service. Inasmuch as the "business of a railroad" is "the transportation of persons and things in commerce" (*Chicago & N. W. Ry. Co.* v. *Bolle*, 284 U. S. 74, 78), the normal inference would be that the carriers would not employ persons whose activities were not regarded by the carriers themselves as necessary to the rendering of the transportation service. Many employees, of course, are not engaged in running trains, but in intrastate activities, and yet a railroad could not function if these activities were not carried on. It clearly could not operate without officers, or accountants, or clerks, or shopmen, to mention only the major examples of employees not themselves engaged in interstate commerce. It would seem clear that such employees, who comprise a large majority of those not engaged in interstate commerce,[23] are subject

[23] In the only tabulation known to us classifying the railroad employees not engaged in interstate commerce (a table submitted by the *railroads* in *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, the railroads claimed that there were 211,107 employees not engaged in interstate commerce. Of these 86,493 were shopmen, 36,996 clerks and accountants, and 6,779 officers, making a total of 130,268 for these three classes alone. See 295 U. S. at 388; October Term, 1934, No. 566, R. 266–267.

to the regulation embodied in the Railway Labor Act (see Point I). Moreover, disputes affecting employees whose work might not be regarded in itself as closely related to interstate commerce might well spread to other employees.[24]

Disputes between a carrier and any of its employees might therefore directly interfere with the efficient functioning of the interstate transportation system. Whether there are any employees as to whom such would not be the case seems highly doubtful. Petitioner has referred specifically only to the back-shop employees themselves, and we have demonstrated above that petitioner's argument that such employees are not properly subject to the Act is unsound. The Record does not contain evidence with respect to any other group of employees. The Circuit Court of Appeals found it (R. 331–332)

> * * * hard to imagine what class of employees of an interstate carrier might not present a danger of disturbance of its interstate business through strikes or other labor

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[24] Thus a dispute with any group of clerks, such as stenographers, might involve the entire clerical and accounting force, the freight handlers, and the express and station employees, inasmuch as the stenographers are represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees. See *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. at 554; October Term, 1929, No. 469, R. 507–8, 421, 145, and 1088. Most of the occupations which might be deemed purely intrastate are represented by the Brotherhood of Railway Clerks. *Ibid.*

> disturbances and thus afford a proper field for the application of the power of Congress. No such class is suggested, except the "back shop" employees before the court, as to whom we have seen that the suggestion cannot be entertained. If, however, there are such employees, it would seem, to use the language of the Chief Justice in the *Railroad Retirement Case*, 295 U. S. at 389, that "In the administration of the Act there would be ample opportunity to make all necessary distinctions between employees engaged in interstate commerce and any others who might be found to be otherwise exclusively employed, so as to exclude the latter from its benefits without impairing the general operation of the Act."

If it is not shown that there are any employees to whom the Railway Labor Act cannot constitutionally be applied, no question of separability can arise. In the subsequent discussion it will be assumed for purposes of the argument that there are some such employees.

The question of whether or not a federal statute is separable depends primarily upon the intention of Congress. *Carter* v. *Carter Coal Company*, 298 U. S. 238, 312; *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, 362; *Utah Power & Light Company* v. *Pfost*, 286 U. S. 165, 184; *Williams* v. *Standard Oil Company*, 278 U. S. 235, 241. There can be no question as to what the intention of Congress would have been in this case. Let us assume that there are a few thou-

sand railroad employees, at most a small proportion of the whole,[25] who might be regarded as outside the regulatory power of Congress. The purpose of Congress was to prevent labor disputes interrupting service on the interstate railroads. If Congress had been told when the Act was before it that it had no power to prevent such disputes among a small proportion of the carriers' employees, would it have then decided not to attempt to prevent disputes at all? It seems obvious that Congress would have desired the Act to apply to a large proportion of railroad employees, in order to prevent a large proportion of the labor disputes which might interfere with interstate transportation, rather than to have the Act declared entirely void. It would surely be more in the public interest to prevent a large number of disputes than to prevent none.

That such would have been the congressional intention is confirmed by a consideration of the necessary character of the work performed by any employees whose work could not constitutionally come under it. In the language of the Circuit Court of Appeals (R. 333):

> Such employees would be outside the realm of federal power only on the ground that disputes and strikes on their part would not interfere with interstate commerce; and since the purpose of the act is to avoid such interference, its intention would not be in

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[25] See note 23 on page 32, *supra*.

> any way violated by excluding them from consideration in the administration of the act.

The intention of Congress would clearly not be violated by excluding the small proportion of the total number of employees on a railroad whose work was not essential to the carrying on of the transportation service.

Thus, even apart from the separability clause (Section 11), Congress would have intended the Railway Labor Act to stand if its application to employees engaged in purely intrastate activities were regarded as invalid. The separability clause, which reverses the normal presumption of inseparability (*Carter* v. *Carter Coal Company, supra*), would seem to make the intention of Congress clear beyond question.

Petitioner's argument that the Railway Labor Act is invalid *in toto* also ignores the decision of this Court in *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548, in which the Act was held valid and given application to a dispute among the clerks. The definition of "employee" referred to on page 31, *supra,* was originally embodied in the Railway Labor Act passed in 1926, and was not altered by the 1934 amendments. Thus the Act would have been equally as unconstitutional when the *Texas and New Orleans* case was before this Court as at the present time if petitioner's argument that the definition makes the Act entirely invalid is a sound

one. It is true that the question of separability was not raised in that case and was not passed upon by this Court in its opinion, but the constitutionality of the Act was attacked. The decision upholding the Act and applying it to clerks is clearly inconsistent with the view that the Act is entirely invalid.

The validity of the Railway Labor Act was again recognized in *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, at 369. The discussion of separability in that case fully supports the Government's position. The Court ruled that the Railroad Retirement Act was inseparable because Congress would not have intended the compulsory pension system to stand with many of its most important features eliminated. The intention of Congress was regarded as controlling. The Court did not hold the Retirement Act inseparable on the ground that it applied to employees not engaged in interstate commerce.

Petitioner relies on the First *Employers Liability Cases* and similar authorities. See *Trade-Mark Cases*, 100 U. S. 82; *United States* v. *Reese*, 92 U. S. 214; *James* v. *Bowman*, 190 U. S. 127; *Butts* v. *Merchants and M. Transportation Co.*, 230 U. S. 126; *Illinois Central R. Co.* v. *McKendree*, 203 U. S. 514. These cases are clearly distinguishable from the Railway Labor Act.

In the first place, in none of them were the situations to which the statutes in question might be invalidly applied so insignificant in relation to the

whole, or the obvious intention of Congress so apparent.

Secondly, the first Employers Liability Act applied *in terms* to all employees of carriers engaged in interstate commerce. The Railway Labor Act on the other hand applies only to those employees listed in the orders of the Interstate Commerce Commission.[26]

Finally, it should be noted that the statutes involved in *The Employers Liability Cases* and the other cases cited did not contain a separability clause.[27] Section 11 of the Railway Labor Act[28] provides:

> If any provision of this Act, *or the application thereof to any person or circumstance,*

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[26] The Interstate Commerce Commission would presumably amend its orders to exclude such local occupations as this Court might determine to be beyond Congressional power. Thus, the rewriting would be not by this Court, but by an administrative agency specifically authorized by Congress.

[27] *Hill* v. *Wallace*, 259 U. S. 44, cited by petitioner, held that a separability clause would not preserve incidental and auxiliary features of a statute when the fundamental provisions upon which they were based were invalid. Various provisions of the Future Trading Act were there regarded as inseparably interwoven, so that it would have been necessary for the Court to dissect the law and reframe a valid statute. No such procedure would be required if certain minor applications of the Railway Labor Act were regarded as invalid.

[28] Section 11 was enacted as part of the 1926 Railway Labor Act. It reads as follows:

"SEC. 11. If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act, and the application of such provision

is held invalid, the remainder of the Act, and the application of such provision to other persons or circumstances, shall not be affected thereby. [Italics supplied.]

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to other persons or circumstances, shall not be affected thereby."

Section 8 of the Act of June 21, 1934, amending the Railway Labor Act, contains a new separability clause reading as follows:

"SEC. 8. If any section, subsection, sentence, clause, or phrase of this Act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this Act. All Acts or parts of Acts inconsistent with the provisions of this Act are hereby repealed."

The new section is not inconsistent with the old, and, the Government submits, did not repeal it. This view is confirmed by the specific manner in which amendments to each section of the 1926 Act were described in the 1934 Act. Sections 1 to 6 of the 1934 Act specifically amend Sections 1 to 6 of the 1926 Act "to read as follows", and accordingly are complete substitutes for those sections in the earlier Act. See the official text of the statute in 48 Stat. 1185. Section 7 of the 1934 Act amends Sections 7, 8, 10, and 12 of the 1926 Act, referring specifically to each section amended. If Congress had intended that Section 8 of the 1934 Act be substituted for Section 11 of the 1926 Act, it would presumably have adopted the same method of statement used in amending the other sections of the 1926 Act, and provided that "Section 11 of the Railway Labor Act is amended to read as follows." Inasmuch as this was not done and the two sections are not inconsistent, it seems clear that the 1934 Section was enacted out of an abundance of caution, in order to add the expression of intention as to the separability of "any section, subsection, sentence, clause, or phrase" to the more general language of Section 11.

The Code of Laws of the United States treats Section 11 as superseded by Section 8 of the 1934 Act, but for the reasons set forth, this would seem to be erroneous. The Code does not, of course, contain the official text of the statute.

The intention of Congress that the remainder of the Act should be upheld, if its application to any group of persons be held invalid, is there clearly set forth. In the present case there are no considerations which tend to overcome the presumption of separability raised by the above clause. For as has been shown, every consideration of intention and congressional policy clearly indicates that Congress would rather have had an Act which would serve to prevent labor disputes among the vast majority of railroad employees than no act at all.

III

The Obligations Imposed Upon the Petitioner by the Decree Are in Execution of Legally Enforceable Provisions of the Railway Labor Act

The decree entered by the District Court (R. 282–283), and affirmed without modification [29] by the Circuit Court of Appeals (R. 341), has four different aspects: (1) it restrains the petitioner from interfering with or coercing any of its Mechanical

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[29] In answer to the argument of the appellant (now petitioner) that the decree was without time limit, the Circuit Court of Appeals did say that "the reasonable interpretation of the language [used in the decree] is that the defendant is directed to treat with the Federation so long as it is the representative of its employees and is restrained from treating with others as their representative so long as the Federation occupies that position." (R. 339.) This might conceivably be regarded as a modification, but, if so, it is not material to the issues before this Court.

Department employees with respect to their right of selecting representatives for the purposes of the Railway Labor Act; (2) it restrains the petitioner from fostering any union of the Mechanical Department employees for the purpose of interfering with the respondent; (3) it requires the petitioner to "treat with" the respondent and to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes between the petitioner and the Mechanical Department employees; and (4) it restrains the petitioner from entering into any contract, undertaking, or agreement of whatsoever kind concerning rules, rates of pay, or working conditions affecting its Mechanical Department employees, save and except only with the respondent.

In this and in the succeeding point (pp. 81–102 *infra*) we shall discuss only the third and fourth aspects of the decree (hereinafter referred to respectively as the "affirmative obligation" and the "negative obligation"). Those are the only parts of the decree which the petitioner contends (1) impose obligations which are not made enforceable by the statute and (2) deprive the petitioner of liberty and property without due process of law. Petitioner does not attack upon these grounds the other provisions of the decree. These other provisions rest upon Section 2, Third, and Section 2, Fourth, of the Act, and their enforceability and

validity are conclusively determined by *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548.

In answering these contentions of the petitioner, we shall consider: (1) the meaning of the provisions of the decree and statute here involved, pp. 42 *et seq.*; (2) whether the provisions of the statute upon which the decree rests are legally enforceable, pp. 54 *et seq.*; and (3) whether the Acts as here applied deprives the petitioner of liberty or property without due process of law, pp. 81 *et seq.* For convenience and brevity we take up each of these points first in connection with the so-called affirmative obligation, and then in connection with the negative obligation. We contend that each is authorized by the statute and is not in violation of the Fifth Amendment to the Constitution.

A. THE MEANING OF THE DECREE AND THE STATUTE

1. THE AFFIRMATIVE OBLIGATION

The affirmative obligation is stated in the decree as follows (R. 282):

> 1. That the said defendant, by and through its duly authorized officers or agents, shall treat with said System Federation No. 40, Railway Employes Department of the American Federation of Labor, so certified as aforesaid, and exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all dis-

> putes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of the defendant growing out of any dispute between the defendant and the Mechanical Department employes thereof.

This paragraph and the sections of the statute upon which it rests (see pp. 54 *et seq., infra*) impose upon the petitioner a duty to afford to the duly designated representative of its employees an opportunity to be heard on matters which the representative wishes to present, and to take up with him such contractual proposals as the carrier itself determines to offer as the basis of a collective bargain. To perform this obligation is (in the technical language commonly used in industrial disputes) *"to recognize"* [30] the respondent.

Neither the affirmative obligation nor any other part of the decree or statute, as the lower court pointed out,[31] imposes upon the petitioner any duty to enter into a particular agreement, to agree upon

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[30] It is in this sense that the word "recognize" was used by the Government in its brief as *amicus curiae* in the lower court, and is generally used. See *Pennsylvania R. R. Co.* v. *United States Railroad Labor Board*, 261 U. S. 72, 85 (line 5); R. 18, 29, 265.

[31] The Circuit Court of Appeals stated:

"The act does not require of the carrier the making of any agreement. It does not interfere with the normal exercise

particular terms, or to make any contract whatsoever. Indeed, many of the meetings which it contemplates may have none of the characteristics of negotiation and may merely afford an opportunity for the employees of the Mechanical Department to appear through a representative in order to be heard as to grievances or to take preliminary steps in accordance with the arbitral or other provisions of the Act.

2. THE NEGATIVE OBLIGATION

Turning to the particular negative obligation with which we are here concerned, we begin with a statement of its terms. It is ordered (R. 283) that the defendant, its officers, agents and employees are

> further enjoined and restrained of and from, directly or indirectly, entering into any contract, undertaking or agreement of whatsoever kind concerning rules, rates of

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of the right of the carrier to select its employees or to discharge them." (R. 333.)

". . . the parties are not bound to agree even though they may treat. The representatives of the employees, as above pointed out, have important functions to perform under the act, which they can perform only if the railroad recognizes and treats with them as representing the employees; and while negotiation may not result in agreement, this is no reason why the carrier should arbitrarily refuse to negotiate with those whom its employees have chosen to represent them in negotiations. In collective bargaining, it may be that negotiations will not result in agreement, but it is certain that there will be no agreement without negotiation." (R. 321.)

> pay or working conditions affecting its Mechanical Department employes, save and except only with the complainant, System Federation No. 40, Railway Employes Department of the American Federation of Labor.

According to our interpretation, this clause prohibits the petitioner from concluding with anyone other than the respondent a *labor agreement,* that is, an agreement which formulates rules, rates of pay, or working conditions governing all or any substantial part of the Mechanical Department employees. We emphasize the concept of "labor agreement" and distinguish it from the ordinary individual hiring. The ordinary individual hiring in the railroad industry is not commonly regarded, or spoken of, as a contract, agreement, or undertaking. In such a hiring, it is not intended that there shall be permanence of obligation, and the parties, far from spelling out the nature of their relationship, usually proceed on the implied or express understanding that the hiring incorporates such rules, rates of pay, and working conditions as may be embodied either in general statements announced by the company, or in general labor agreements negotiated by the company after collective bargaining with representatives of the employees.

Our interpretation of the negative obligation (which restricts its scope to labor agreements and does not include individual hirings) becomes inevitable when consideration is given (1) to the set-

ting of the decree in relation to the evidence and the pleading in this case, (2) to the meaning of the statutory provisions upon which the decree is based, and (3) to the practical consequences which would follow if the prohibition were presumed to be directed to individual hirings.

On railroad lines throughout the country the practice is to have for each class or craft a single standard of rates of pay, rules, and working conditions.[32] The evidence in the record shows that this general practice is followed on the petitioner's transportation system. An individual who wants a job fills out an application blank which reveals nothing about rates of pay or other rules, and if he is hired it is assumed that the terms of his employment are covered by such collective agreement as may be outstanding. (R. 252–253, 185, 200.)

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[32] Section 5, Third, (e), of the Railway Labor Act requires that "every carrier shall file with the Mediation Board a copy of each contract with its employees in effect on the 1st day of April 1934, covering rates of pay, rules, and working conditions. If no contract with any craft or class of its employees has been entered into, the carrier shall file with the Mediation Board a statement of that fact including also a statement of the rates of pay, rules, and working conditions applicable in dealing with such craft or class. * * *" An examination of all these contracts and statements reveals that the custom of the industry is to have for regular employees in each class or craft a single standard of rates of pay, rules, and working conditions. Sometimes this standard is prescribed by collective contract; other times by mere announcements or statements of the carrier acting independently.

Prior to the filing of this suit, the single standard on the petitioner's line had been formulated in a collective contract between the petitioner and a so-called company union (R. 200) which was in fact a "figurehead" (R. 266) organized "to prevent its [the petitioner's] Mechanical Department employees from exercising their free and untrammeled right to choose their own representative." (Fgs. R. 281.) With this evil in mind, the respondent's bill of complaint prayed (R. 29–30) that the petitioner be restrained—

> from entering into any contract concerning rules, rates of pay, or working conditions affecting the Mechanical Department employees of The Virginian Railway Company, with the Mechanical Department Association of The Virginian Railway Company or Independent Shop Crafts Association of The Virginian Railway Company, *or any other association or "company union"* so called, as the representative of the said Mechanical Department employees, save only the complainant Federation. [Italics added.]

Thus the prayer was obviously directed at a prohibition of labor agreements or collective contracts, not at individual hirings. The decree, as its form indicates, was intended to correspond with the prayer, except that it was so worded as to make it clear that the ban included labor agreements which covered any, as well as labor agreements which

covered all, of the employees in the Mechanical Department.[33] The decree was not intended to prohibit individual hirings. It was understood in this sense by the lower courts [34] and by the parties themselves, at least until the petition for certiorari was filed in this Court.

The decree, of course, rests for its authority upon the statute. Examination of the Act discloses no intent to prevent carriers from making individual contracts of hire with whomsoever they choose. The statute repeatedly refers to "agreements concerning rates of pay, rules, and working conditions" as the contracts to be negotiated between carriers and representatives of their employees, and imposes a duty upon the parties to confer with respect to the making, alteration, and interpretation of such agreements. Section 2, First, Sixth, Seventh; Section 2, First (i); Section 6. Only contracts covering rates of pay, rules, and working conditions for a craft or class are required to be filed with the National Mediation Board. Section 5, Third (e). That section makes it plain

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[33] Observe that the prohibition in the decree is aimed at any contract "affecting its Mechanical Department *employees*." The plural form of the noun "employee" lends emphasis to our construction of the decree as aimed at contracts covering groups of employees.

[34] The Circuit Court of Appeals stated that the act as applied by the decree "does not interfere with the normal exercise of the right of the carrier to select its employees or to discharge them." (R. 333.)

that the Act does not purport to deal with individual contracts of employment, but only with the collective agreement or general statement of rules applying to a craft or class.

The decree, which by its terms is confined to such contracts, undertakings, or agreements, was obviously intended to fit into this statutory plan. The negative obligation, with which we are here concerned, has two alternative statutory foundations. It may rest upon those statutory provisions similar to or expanded from those upheld in the *Texas & New Orleans* case, which prohibited interference by carriers with their employees' selection of representatives. Section 2, Third and Fourth. From the record it is manifest that the insistence of the petitioner upon entering into agreements with company-dominated unions rather than with the Federation was a means of interfering with the employees' freedom in selecting their own representatives. (See pp. 77–80, *infra*.) One purpose of the negative obligation was to prohibit such interference by preventing the carrier from entering into *labor agreements* with such company unions. The similarity between this portion of the decree and the corresponding provision in the prayer for relief (see p. 47, *supra*), as well as the organization of the decree, which places the negative obligation in that paragraph which restrains other acts of interference, lends support to this view.

The negative obligation may also rest upon the second sentences of Section 2, paragraphs Fourth and Ninth, each of which declares that the representative chosen by the majority shall be "*the* representative of the craft or class for the purposes of this Act", and the necessary implication from the provisions of Section 6 (and also Section 2, Second and Sixth) that carriers shall confer with representatives of the employees before changing rates of pay, rules, or working conditions.[35] Since the representative chosen is to be "*the* representative of the craft or class", it is clear that he must be the representative of the entire craft and not merely of the majority who voted for him. That such was the meaning of Congress is manifest from the provision for secret elections in Section 2, Ninth, since the necessary consequence of a secret ballot in which no one can know who supported and who opposed a successful candidate is that the winner represents all.

The representative of the majority is to represent the craft or class only for "the purposes of this Act." The only function which the Act reserves to craft representatives is the making or changing of labor agreements with respect to rates of pay, rules, and working conditions. Section 6; Section 2, Seventh; *cf.* Section 5, Third (e). The Act specifically provides that in any dispute

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[35] It should be noted that the obligations in Section 6 are clearly enforceable, since they are fortified by the penal sanctions of Section 2, Tenth. See Section 2, Seventh.

growing out of grievances or the application of labor agreements the "parties may be heard either in person, by counsel, or by their representatives." Section 3, First (i), (j).

A construction of the decree which would go beyond a prohibition of labor agreements covering the whole craft or minority groups, and embrace individual hirings, would be, in our opinion, not only unwarranted on the face of the record, but also would raise unnecessarily difficult statutory and constitutional questions. If the petitioner were prohibited from hiring any individual person except pursuant to a contract with the respondent, the result would be that the petitioner would be faced with the inescapable dilemma of either contracting with the respondent or going out of business. We believe that no such dilemma exists or was intended.[35a] We concede, and we understand that the respondent also concedes, that under the decree the petitioner is free to continue individual hirings, so long as those hirings do not purport to prescribe rates of pay, rules, or working conditions for a group of men, and so long as they are not

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[35a] The Government interprets the negative obligations imposed by the statute and decree as having the following effect:

When the majority of a craft or class has (either by secret ballot or otherwise) selected a representative, the carrier cannot make with anyone other than the representative a collective contract (i. e., a contract which sets rates of pay, rules, or working conditions), whether the contract covers the class as a whole or a part thereof. Neither the

designed to interfere with or discourage membership in the respondent labor organization.[36]

In concluding our discussion of the meaning of the decree, we wish to point out that neither the decree nor the Act in any way sanctioned the so-called closed shop. Employees are not required to belong to the organization chosen by the majority of their craft to represent them. Indeed, statutory provisions not here in issue specifically outlaw the closed shop in the railroad industry. Section 2, Fifth.

The above analysis of the meaning of the affirmative and negative obligations in the decree makes it

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statute nor the decree prevents the carrier from refusing to make a collective contract and hiring individuals on whatever terms the carrier may by unilateral action determine. In hirings of that sort the individual does not deal in a representative capacity with the carrier and the hiring does not set general rates of pay, rules, or working conditions. Of course, as a matter of voluntary action, not as a result of the statute or the decree, the carrier may contract with the duly designated representative to hire individuals only on the terms of a collective understanding between the carrier and the representative: but any such agreement would be entirely voluntary on the carrier's part and would in no sense be compelled.

If the majority of a craft or class has not selected a representative, the carrier is free to make with anyone it pleases and for any group it pleases contracts establishing rates of pay, rules, or working conditions.

[36] Of course, if the petitioner offered to hire an individual at a higher rate provided he did not join the respondent's organization, the petitioner would be violating other clauses of the injunction which are not now at issue, and also would be violating Section 2, Third, and Section 2, Fourth, of the Act.

clear that (1) the decree does not impose upon the petitioner a duty to make any contract whatsoever; (2) the petitioner retains "the normal exercise of the right of a carrier to select its employees or to discharge them" (*Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548, 571); (3) the decree does not prevent any individual employee or group of employees from at any time presenting grievances to the petitioner; and (4) the decree in no way involves "the closed shop." Moreover, it is important to note that (5) the decree does not prohibit the petitioner from negotiating with the respondent a labor agreement under which special compensation or consideration will be given to individual employees or groups of employees upon the basis of special skill, seniority, and the like.[37]

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[37] It is interesting to note that the collective contract under which the petitioner now operates (see note 10, p. 20, *supra*) provides special privileges for senior workers (R. 245), and while stipulating for minimum compensation for each craft or class (Rule 37), does not make it a breach of contract for the carrier to pay more to workers of special skill. The contract also provides for the individual handling of grievances (R. 246). The respondent has already indicated that it is satisfied with the substantive terms of this contract (R. 55, 62, 75–76, 78–79, 206), and so it would appear that no legal obstacle stands in the way of exceptional workers receiving exceptional treatment.

B. THE PROVISIONS OF THE ACT UPON WHICH THE DECREE RESTS ARE LEGALLY ENFORCEABLE

1. THE AFFIRMATIVE OBLIGATION

The affirmative obligation to treat or confer with the representative of the employees may rest either upon the First and Second paragraphs of Section 2, or upon paragraph Ninth. Section 2, First and Second, which were not changed by the 1934 amendments to the Railway Labor Act, are of broader application, and will be considered first.

Section 2, Paragraphs First and Second.

Paragraphs First and Second of Section 2 read as follows:

> First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.
>
> Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

It is true that the language of these paragraphs is much the same[38] as that used in Title III, Section 301 of the Transportation Act of 1920, and that the language of that earlier statute has been held to be of imperfect legal obligation. *Pennsylvania Railroad Company* v. *United States Railroad Labor Board,* 261 U. S. 72; *Pennsylvania Railroad System and Allied Lines Federation No. 90* v. *Pennsylvania Railroad Company,* 267 U. S. 203. Ordinarily the incorporation of much the same phraseology in a subsequent statute would justify a presumption that Congress intended the phrases to receive in the new statute the same construction that they had already received in the old. But though this is the ordinary presumption, it is not the invariable rule. Compare *The Abbotsford,* 98

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[38] The language of the two Acts differed in one important respect. Section 301 of the 1920 Act provided that "it shall be the duty of" carriers and their employees "to exert every reasonable effort and adopt every available means *to avoid any interruption to the operation of any carrier* growing out of" a labor dispute. Section 2 of the 1926 Act made it the duty of carriers and their employees "to exert every reasonable effort *to make and maintain agreements concerning rates of pay, rules, and working conditions,* and to settle all disputes * * * in order to avoid any interruption to commerce." This change was deliberately made in order to give definite substance to the previous broad general requirement, with a view to rendering arbitrary refusal to comply subject to judicial compulsion. See the statement of Mr. Donald Richberg in explaining the 1926 Act to the House Committee on Interstate and Foreign Commerce (Hearings on H. R. 7180, 69th Cong., 1st Sess., p. 84).

U. S. 440, 444; *Wood* v. *Brady*, 150 U. S. 18, 22–23; *Bacon* v. *Texas*, 163 U. S. 207, 226. And there are pressing reasons why in this case the presumption should not be indulged in.

As used in the 1920 statute, the paragraphs were ancillary to a system which was bottomed solely upon the force of public opinion and which (except in respect to the production of testimony) was not buttressed by legal, equitable, or criminal sanctions. Indeed, in the second *Pennsylvania* case, Chief Justice Taft said (267 U. S. 216):

> The so-called mandatory language of Section 301 [the predecessor of paragraphs First and Second of Section 2 now under discussion] might, if that section were accompanied by a penalty for its violation or some other means of compulsion, and there were not the other provisions of the Title to help its construction, be given the force of a statutory obligation of the parties to a dispute.

Thus the Court held that the language of the First and Second paragraphs did not create an enforceable obligation, partly because the statute as a whole did not contemplate legal sanctions but relied on publicity.

The Railway Labor Act had an entirely different base and orientation. Although voluntary agreement was the ultimate goal, parties were required, by legal sanctions, not to interfere with the procedure prescribed by the statute as most likely to lead to the amicable settlement of disputes.

Texas & New Orleans R. Co. v. *Brotherhood of Railway Clerks, supra.* When the Railway Labor Act was under legislative consideration in 1926, the proponents of the measure regarded the alteration of the language of Section 2, First and Second, from that used in Section 301 of the Transportation Act of 1920 as sufficient to permit enforcement of the obligations there set forth. See footnote 38, page 55, *supra.* The proponents of the Act pointed out that the extent to which these provisions could be enforced necessarily would have to be evolved by the courts and adapted to the particular violations which might be proved.[39]

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[39] Mr. Richberg, who explained the bill to the House Committee on Interstate and Foreign Commerce, testified as follows in answer to questions as to whether Section 2, paragraphs First and Second, were enforceable (Hearings on H. R. 7180, 69th Cong., 1st Sess.):

"I think any action involving an arbitrary refusal to comply with that duty might be subject to judicial compulsion. * * * In other words, I think it would not be exerting a reasonable effort to make and maintain agreements, for a carrier or its appropriate officers to refuse to even meet a committee that sought to make an agreement" (P. 84).

* * * * * *

"I think that a duty imposed by law is enforceable by judicial power. Of course, this is not a duty which could be enforced in a very absolute way, because it is a duty to exert every reasonable effort. In other words, all that could be enforced by the court would be an order against an arbitrary refusal to even attempt to comply with that duty, but I believe that could be subject to judicial power" (P. 85).

* * * * * *

"In the first place, it is their duty to exert every reasonable effort . * * * to settle all disputes, whether arising out of

The 1934 amendments to the Railway Labor Act greatly enlarged the scope of the enforceable obligations which fortified the procedural aspects of the statutory plan. See page 64, *infra*. In a statutory system of this type, the language of paragraphs First and Second should be read in their natural sense of enforceable obligations and as ancillary to a system resting on legal sanctions.

Any other reading produces obvious absurdities. For example, it is (by Section 2, Tenth) made criminal for a carrier to fail to publish a notice (prescribed by Section 2, Eighth) informing its employees that all disputes will be handled in accordance with the requirements of the Act; that is, by conferences envisaged by paragraph Second, and perhaps also First, of Section 2. Can it be that Congress intended that a carrier should be fined for failure to notify employees that it will hold a conference, but should not be under a legal obligation to hold the conference?

Again, a carrier is by criminal sanctions (Section 2, Tenth) prevented from changing "rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in sec-

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the abrogation of agreements or otherwise, in order to avoid any interruption to commerce. In other words, the legal obligation is imposed, and as I have previously stated, and I want to emphasize it, I believe that the deliberate violation of that legal obligation could be prevented by court compulsion" (P. 91).

tion 6 of this Act." (Section 2, Seventh.) And in Section 6 it is prescribed that:

> SEC. 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the *time and place for the beginning of conference* between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. * * * [Italics added.]

Can it be that a carrier, like the petitioner, which has an agreement, is by the statute required, under penalty of a fine, to set a time and place for a conference when it wishes to change the working conditions of its employees, but is not under a legal obligation to confer with the representative of its employees when they have a grievance or contractual proposal?

These other provisions of the present Railway Labor Act to which we have referred [40] make it

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[40] See also Section 2, Sixth, which provides:

"Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time

abundantly clear that Congress by 1934 (if not by 1926) intended to impose upon carriers an obligation to confer when requested. *Noscitur a sociis.* If the dicta of the Chief Justice in *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548, 567–568, intimate a contrary interpretation of the 1926 Act *prior* to the 1934 amendments, we submit that they should not be deemed controlling in construing the Act *after* those amendments.

Petitioner's objection that an obligation of this kind is not subject to enforcement in equity is considered below. See pp. 71–76, *infra.*

Section 2, Paragraph Ninth.

Whether or not paragraphs First and Second of Section 2 are deemed legally enforceable, the requirement in the decree that petitioner treat with respondent is clearly supported by Section 2, Ninth, which, so far as material, provides:

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and place at which such conference shall be held: *Provided*, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further*, That nothing in this Act shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties."

Although criminal sanctions are not attached to this section, it seems indisputable that civil process was intended to be available in order to compel a party to a dispute to specify a time and place for a conference.

> Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representatives so certified as the representative of the craft or class for the purposes of this Act.

The respondent's brief, pages 19–31, and the opinion of the Circuit Court of Appeals (R. 319), state in such detail the history of federal measures respecting collective bargaining in the railway industry and the legislative history of this particular paragraph that we do not need to review the material again here. The story already twice told reveals a steady progress from a system resting on no other sanction than publicity, to a statutory plan in which voluntary negotiation and arbitration is the goal, but to which legal obligations as to certain procedural steps have been added to make it more likely that the goal will be attained.

It is sufficient here to point out briefly that the Act passed in 1926 was based on the theory that

interruptions to commerce could be prevented through the establishment of a mechanism for bringing carriers and their employees into voluntary agreement. Conferences between representatives of the parties were an integral part of the scheme, and it was regarded as essential that each party have complete freedom of choice in the selection of its own representatives. The effectiveness of the Act was impaired by the insistence of some carriers that the representatives actually chosen by their employees did not represent a majority and their consequent refusal to deal with them. The Act provided no method for bringing the parties together under those circumstances. Section 2, Ninth, was enacted in order to remove this weakness from the statutory machinery.

It is in this setting that the language of Section 2, Ninth, must be read. The second and crucial sentence provides that, "Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act." The use of the auxiliary verb "shall" indicates that the direction is mandatory. *Escoe* v. *Zerbst*, 295 U. S. 490, 493. This mandatory direction is "to treat with." The verb "treat",[41] and, even more for-

[41] The leading dictionaries define the phrase as follows:

1. Oxford or Murray, *New English Dictionary*, vol. 10, pt. 1, p. 307, gives as the first meaning: "To deal or carry on negotiations (*with* another) with a view to settling terms; to discuss terms of settlement; to bargain, negotiate."

cibly, the intransitive verbal phrase "treat with",[42] commonly connote an obligation to meet in order to deal or discuss or negotiate.

In order to show that the statutory language has not the specific imperative force that we ascribe to it, the petitioner advances a number of different arguments which we shall consider successively.

The petitioner asserts that it cannot be supposed that Congress intended to prescribe a legally enforceable obligation to treat since that would be inconsistent with what the petitioner describes as "a voluntary scheme for the adjustment of the relations between carriers and their employees." (Br. 23–25.) At the root of this assertion is a false premise. It is true and important that the ultimate goal of the Railway Labor Act is industrial peace attained by agreements voluntarily ar-

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2. *Standard Dictionary* (1895), vol. 2, p. 1922, gives as a secondary meaning: "To propose and discuss mutually terms of agreement; arrange a treaty: negotiate."

3. *Century Dictionary*, vol. 10, p. 6450, gives as an alternative meaning: "To negotiate, especially for peace; discuss terms of accommodation; used absolutely or with a limiting phrase."

4. Webster's *New International Dictionary* (2d ed., 1936), p. 2699, gives as the primary meaning: "To negotiate; to consider terms of accommodation, settlement, or the like; as to send envoys to *treat* with the French government, or to *treat* for peace."

[42] Petitioner's argument that "treat" is used in the statute not in the sense of "negotiate" but in the sense of "act towards or regard" (Br. 20) confuses the transitive with the intransitive use of the verb, and completely ignores the accompanying preposition "with."

rived at. But it is not true that Congress, in its desire to see that goal achieved, has been indifferent to procedure or has thought that this goal would always be reached if one party were left with complete license to prevent the other party from trying to reach an amicable settlement. To achieve its objective of peace on the railroads through orderly procedure, Congress has, for example, laid down a prohibition against either party interfering with the other party in the designation of its representatives. And this prohibition is enforceable not merely by a suit in equity (*Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548), but even in certain cases by criminal penalties (Section 2, Tenth, of the Act).

Indeed, the sanctions of the criminal as well as the civil law have, by Section 2, Tenth, been made applicable not only to interferences with the designation of representatives (Section 2, Third), but also to interferences with labor organizations of employees (Section 2, Fourth), to coercive attempts to induce employees to join or not to join a labor organization (Section 2, Fourth and Fifth), to changes, without thirty days' notice, in the rates of pay, rules, or working conditions of classes of employees (Section 2, Seventh), and to failure by carriers to notify their employees that disputes will be handled in accordance with the Railway Labor Act (Section 2, Eighth).

Moreover, as this Court has already recognized (*Texas & New Orleans R. Co.* v. *Brotherhood of*

Railway Clerks, 281 U. S. 548, 565–567), the Railway Labor Act provides for injunctions against groups of employees if they strike during and for thirty days after the deliberations of an Emergency Board established under Section 10. Finally, legal sanctions are indubitably attached to various steps in the arbitration processes set out in Sections 3 and 7. (See the opinion of the Circuit Court of Appeals, R. 317–318, also quoted in respondent's brief, pp. 38–40.)

"It is thus apparent that Congress, in the legislation of 1926 [as amended], while elaborating a plan for amicable adjustments and voluntary arbitration of disputes between common carriers and their employees, thought it necessary to impose, and did impose, certain definite obligations enforceable by judicial proceedings." *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548, 567.

Indeed, if consistency with the rest of the statute be the standard, it is inescapable that our construction of Section 2, Ninth, meets the test far better than petitioner's construction. In a statute that suspends the employees' right to strike and that prescribes for carriers fines and jail sentences if they do not notify their employees that they will handle disputes in accordance with the requirements of the Act (Section 2, Eighth), or if they change the terms of employment without giving thirty days' notice (Section 2, Seventh), it is only consistent to regard a provision directing a car-

rier to treat as imperative, not hortatory; enforceable, not precatory.

The argument based on consistency which we have just considered is presented a second time in the petitioner's brief in a slightly altered form. It is said (Br. 24) that if Section 2, Ninth, does impose a legally enforceable obligation to treat, it introduces into the Railway Labor Act of 1926 a new principle, and Congress cannot have intended such an innovation, inasmuch as in the Report of the Committee on Interstate and Foreign Commerce of the House of Representatives it is stated that the 1934 Amendments did "not introduce any new principles into the existing Railway Labor Act" and did "not change the methods of conference, mediation, and voluntary arbitration to settle major disputes over wages and working conditions, which are provided in the Railway Labor Act of 1926." See House Rep. 1944, 73d Cong., 2d Sess.

To this the first answer is that joint conference between carriers and representatives of employees was always a "principle" of the Railway Labor Act. See Section 2, First and Second, of the Railway Labor Act of May 20, 1926, c. 347, 44 Stat. 577. Even if, *arguendo,* we assume that prior to the amendments of 1934 the duty to treat was one of imperfect legal obligation,[43] it was nonetheless a fundamental principle. Section 2, Ninth, does not change the "principle" or the "methods" of con-

[43] See, however, pp. 54–56, *supra.*

ference, mediation and so forth. Nor did it alter the ultimate goal of agreement voluntarily arrived at. It did add, for the preservation and protection of existing methods, new legal sanctions. But the legal sanctions added by Section 2, Ninth, are not radically different from (though they are less stringent than) the other legal sanctions added by Section 2, Tenth, so as to cover other phases of the established mechanism or methods of conference. See page 64, *supra*. The language of the Committee Report was evidently not regarded by Congress as inconsistent with the criminal sanctions added by Section 2, Tenth; and there is, therefore, no reason to regard the language as inconsistent with the existence of a civil sanction in Section 2, Ninth.

The petitioner next asserts (Br. 22) that since the provisions of Section 2, Ninth, apply only to cases in which a "dispute shall arise among a carrier's employees," it would be anomalous to find set forth in that section (and nowhere else in the statute) a duty on the part of a carrier to treat with representatives. Such a construction, according to petitioner, would mean that if there was no dispute among the employees, the carrier would not be obliged to treat with their representative.

If we take for the sake of argument the petitioner's underlying assumption that no provision other than Section 2, Ninth, imposes upon carriers

a duty to treat,"[44] nonetheless it does not follow that there is an inexplicable anomaly in imposing upon a carrier a legally enforceable duty to treat *only* in those situations in which a dispute has arisen as to who are the representatives of its employees. Section 2, Ninth (as the respondent has already narrated in detail, Br. 26–31) was proposed and enacted in order to meet a particular evil which common experience, and indeed cases in this Court, showed recurred frequently. *Pennsylvania R. R. Co.* v. *United States Railroad Labor Board,* 261 U. S. 72; *Pennsylvania Railroad System and Allied Lines Federation No. 90* v. *Pennsylvania R. R. Co.,* 267 U. S. 203; *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548. Carriers would decline to meet representatives of their employees on the pretext (or on the genuine ground) that they did not know whom the men wished to select as their agent. That is, carriers declined both (1) to admit that persons claiming to be representatives were the choice of a majority, and (2) to treat with such persons.[45] The remedy

[44] But see our discussion of Section 2, First and Second, pp. 54–60, *supra.*

[45] See testimony of George M. Harrison in the hearings held by the House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess., on H. R. 7650, pp. 78, 79, quoted in respondent's brief, pp. 27–29. It is interesting to note that the petitioner itself has resorted to the very tactics which were described in the hearings, and which gave rise to the statute (R. 137).

of Section 2, Ninth, was undoubtedly intended to be coextensive with these evils. H. Rep. 1944, 73d Cong., 2d Sess., p. 2. But because Congress provided for a remedy that went as far as the evils which it knew existed, it was not bound to go farther and provide remedies for evils which were not called to its attention and which apparently never existed. So far as we are aware, it was not in 1934, and is not now, common experience for carriers to refuse to treat with persons whose representative character they have admitted from the outset. The imperative obligations of a statute are not to be disregarded because the statute does not cover every evil which imagination may conjecture, particularly when there is no proof that such evil recurs frequently. "It is established by repeated decisions that a statute aimed at what is deemed an evil, and hitting it presumably where experience shows it to be most felt, is not to be upset by thinking up and enumerating other instances to which it might have been applied equally well, so far as the court can see." *Keokee Consolidated Coke Co.* v. *Taylor,* 234 U. S. 224, 227. See also *Central Lumber Co.* v. *South Dakota,* 226 U. S. 157; *Armour & Co.* v. *North Dakota,* 240 U. S. 510, 517; *Hall* v. *Geiger-Jones Co.,* 242 U. S. 539, 557.

The petitioner suggests that the Act should not be construed to impose an obligation to treat upon the carrier because the employees "are under no corresponding duty to negotiate with the representatives of the carrier." (Br. 31.) In our

opinion the representatives of the employees, like the carrier itself, are under an equitably enforceable obligation to confer. Section 2, First, Second, Sixth, Seventh; Section 6. See pp. 54–60, *supra*. However, if it be assumed that Section 2, Ninth, is the only section which enforces an obligation to treat (and that paragraphs First, Second, and particularly Sixth create no legally enforceable duties), then it is true that the statute does not require the employees to treat with the carrier. But if there is an omission it is easily explicable. We know of no labor leader or other employee representative who has refused to "treat with" an employer. Such a representative might in some cases make excessive requests, but it is a novel suggestion that he would fail to make or listen to any request or would be unwilling to treat with the employer. Certainly no suggestion was made to Congress that employee representatives failed to treat with carriers. Moreover, it may be noted that the suspension of the right of employees to strike in combination (referred to on page 65, *supra*) is in some respects an obligation roughly corresponding to the carrier's obligation to treat. In each case the objective is to require the parties to deliberate and consider amicable adjustment before taking important action.

The petitioner also places some reliance on the concluding clause of the applicable sentence of Section 2, Ninth. It is said that the duty imposed, if any exists, is merely to admit that the representative

selected by the majority in an election and certified by the board is "the representative of the class or craft," and that there is no duty to meet with such representative or treat with him. (Br. 20.) If that was all the clause meant, it would be redundant. In an earlier paragraph, Section 2, Fourth, it had already been provided that "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act." Section 2, Ninth, adds a further obligation, an obligation to treat; and "This addition can not be treated as superfluous or insignificant, or as intended to be without effect." *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548, 568. Indeed, the clause in the second sentence of Section 2, Ninth, which specifies that the carrier shall treat with the representative "as the representative of the craft or class for the purposes of this Act" seems designed not to limit the carrier's obligation, but to make it abundantly clear that any treating is with the representative in his representative (not his individual) capacity.

A final point advanced by the petitioner to show that we are mistaken in construing Section 2, Ninth, as creating an enforceable obligation is that such an obligation is "beyond the powers of a court of equity to enforce." (Br. 26–29.) The petitioner's point subdivides itself into three contentions: (1) that a court cannot ascertain whether the obligation is performed; (2) that the process of a

court which directed the execution of the obligation would be intrinsically incapable of enforcement; and (3) that a court does not compel a party to take a preliminary step unless it can and will compel him to achieve the ultimate result to which it is preliminary.

We can perceive no difficulty in ascertaining from objective evidence whether a carrier does in fact meet with representatives upon their request and afford to them an opportunity to be heard on such problems as they raise. Nor is it impossible to ascertain from objective evidence whether in such meetings the carrier acts in good faith. "It is no more difficult to appraise conduct of this sort in connection with * * * the purposes of this Act than in relation to well-known applications of the law with respect to fraud, duress and undue influence." *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548, 568. "The state of a man's mind is as much a fact as the state of his digestion." Bowen, L. J. in *Edgington* v. *Fitzmaurice*, 29 Ch. Div. 459, 483 (C. A.).

Nor is there merit to the contention that it is logically or practically impossible to use the process of a court to enforce the affirmative obligation. As we have already stated, pp. 43–44, *supra*, the affirmative obligation is merely to afford to representatives an opportunity to be heard, not to reach an agreement. Such an obligation to afford an opportunity to be heard is frequently enforced by judicial process. Thus mandamus (which is the legal

remedy equivalent to the equitable remedy of mandatory injunction, *United States ex rel. Greathouse* v. *Dern*, 289 U. S. 352, 359; *Miguel* v. *McCarl*, 291 U. S. 442) is addressed to administrative officers to require them to hear and decide questions "in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion in a particular way". *Wilbur* v. *United States ex rel. Kadrie*, 281 U. S. 206, 218; *Interstate Commerce Commission* v. *United States ex rel. Humboldt Steamship Co.*, 224 U. S. 474, 484–485; *United States ex rel. Dunlap* v. *Black*, 128 U. S. 40, 48. And the execution of a decree which requires a carrier to receive human beings for the purpose of conferring with them is physically no more difficult for a court officer to superintend than the execution of a decree which requires a carrier to receive freight cars for the purpose of switching them. *Peoria Ry. Co.* v. *United States*, 263 U. S. 528, 535.

It is true that in the absence of a general statutory scheme which provided for the hearing of grievances and contractual proposals as steps intermediate to other proceedings having themselves legal significance or legal sanctions, a court of equity might not choose to issue such a decree. But the presence of the statutory scheme makes a vital difference. Where such a scheme exists, the order to the carrier to afford a hearing has significance and value even though no contract or settlement of grievances results from the hearing, for the hearing carries order starts in motion other steps in the

statutory process.[47] The importance of the mandatory injunction "in its relation to the plan devised by the Act must have appropriate consideration". *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548, 568.

Indeed, it would be difficult to find a better illustration than the line of authority to which the petitioner itself refers (Br. 27–28) to show that an equity court draws a distinction between the enforcement of an obligation which stands alone, and the enforcement of an obligation which is an integral step in a statutory scheme. In the absence of a statutory scheme the chancellor would not compel one who had promised to arbitrate to appoint arbitrators. It was so held in the very case which petitioner cites, *Tobey* v. *County of Bristol,* 23 Fed. Cas. 1313, Fed. Cas. No. 14,065 (C. C. D. Mass.). But as soon as a statutory scheme was established by the legislature, courts of equity no longer hesitated to order a recalcitrant promisor to execute his promise to appoint an arbitrator. *Red Cross Line* v. *Atlantic Fruit Co.,* 264 U. S. 109, 119, 121; *Marine Transit Co.* v. *Dreyfus,* 284 U. S. 263, 274–275, 278.

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[47] Thus, the Circuit Court of Appeals, after outlining the Act's procedure for the adjustment of disputes and grievances, stated (R. 318): "It is clear that all of these provisions, so carefully made for the settlement of disputes which might lead to strikes and industrial warfare, would amount to nothing if the carrier should refuse to recognize or treat with the representatives of its employees * * *."

The situation in the case at bar is like that which exists under modern arbitration statutes, and is quite unlike that which exists when a court is asked to order a partner to carry on a business, an author to write, a performer to act, or a master to paint. (Pet. Br. pp. 27–28.) In those cases a decree, as Judge Story said in the passage cited by the petitioner (Br. pp. 27–28), "would be a vain and imperfect act". If the person to whom such an order was directed chose to defy it, the objective aimed at could not be carried forward or even superintended by anyone else, and the sole remedy would be to fine the defendant for contempt (imprisonment being impossible under the Thirteenth Amendment). Here, on the other hand, even if the hearing does not produce an immediate settlement, not only is other statutory procedure for the same end available, but also the very hearing is likely to facilitate an eventual settlement.[48] As the Circuit Court of Appeals said (R. 321):

> In collective bargaining, it may be that negotiations will not result in agreement, but it is certain that there will be no agreement without negotiation.

[48] In this connection it is interesting to compare with an order directing a carrier to afford a hearing, an order directing a group of employees not to strike during a temporary period. Section 10 of the Act. In the case of each order the decree may not achieve peace, but by promoting deliberative processes and allowing a period of consideration it increases the likelihood of amicable settlement.

The preceding paragraphs also answer the petitioner's contention that a court will not compel a party to take a preliminary step unless it can and will compel him to achieve the ultimate result. The conference cannot be regarded merely as a "preliminary step." Experience shows that in most cases, the conference will itself result in an amicable adjustment between the parties. See National Mediation Board, *Second Annual Report*, p. 1. When settlement does not occur in this way, the conference will be preliminary to an adjustment of grievances or disputes through the good offices of various adjustment boards, of the National Mediation Board, of Emergency Boards, or of other persons. Thus compelling the hearing is preliminary to ultimate steps having legal significance. All the statutory provisions with respect to amicable adjustments and to agreements for arbitration of disputes, indeed the entire policy of the Act, must depend upon the willingness of the parties to hear one another's representatives.

2. THE NEGATIVE OBLIGATION

We turn now to the negative obligation in the decree: *i. e.*, the prohibition against making a labor agreement with another than the duly designated representative.

There are three different possible statutory bases for the negative obligation in the decree. First, that obligation may be regarded as the most appropriate method for a court of equity to enforce the

affirmative statutory obligation to treat. That is, if the petitioner were correct in arguing that a court of equity would be incapable of enforcing the affirmative obligation of the statute by affirmative decree (but see pages 71–76, *supra*), such a court could at least enforce such affirmative substantive obligation by an injunction negative in form. Cf. *Lumley* v. *Wagner*, 1 De G. M. & G. 604.

Second, as we have pointed out at pages 50–51, *supra*, the negative obligation of the decree may be bottomed upon Section 2, Fourth, and Section 2, Ninth. These statutory provisions expressly declare that the representative chosen by the majority shall be "the representative of the craft or class for the purposes of this Act", and therefore imply that no one other than that representative may make a contract with the carrier establishing group rates of pay, rules or working conditions. Of course, as *Lumley* v. *Wagner*, *supra*, shows, there is no question that such a negative obligation is within the enforcement powers of an equity court.

Third, the negative portion of the decree may also be based upon Section 2, Third and Fourth [49]

[49] "Third. Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

which are unquestionably enforceable, both equitably (*Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks, supra*) and criminally (Section 2, Tenth), entirely apart from the statutory provisions hitherto considered.

The evidence in the case shows that for many years the petitioner has been having contractual relations with company-dominated unions which the trial court characterized as "figureheads" (R. 266). The first company-dominated union, known as the "Mechanical Department Association," was

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"Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization."

a dummy organization having no function except to hold biennial elections for officers (R. 81, 89–90, 103–104, 114) and to sign a contract which was not negotiated but literally dictated by the railway mor than a decade ago (R. 165). The one attempt its officers made to secure better working conditions was entirely abortive (R. 82). A second company-dominated union, known as the "Independent Shop Crafts Association", was also a hollow shell. The Secretary-Treasurer of the organization did not even know who was the Chairman of the organization (R. 163). Although both of these associations were patent attempts to interfere with the self-organization of the employees, petitioner carried on purported contractual dealings with them (R. 75, 105, 45). At the same time the officers of the respondent were unable to see the President of the Railway (R. 75, 79, 104) or anyone with authority to make an agreement for the Railway (R. 75, 78). As petitioner's counsel stated in open court: "We say it frankly, that the defendant has not accepted this organization as the duly appointed representative" (R. 143).

Upon the basis of this evidence the District Judge found that the company-dominated unions were maintained in an "effort to prevent its [the petitioner's] Mechanical Department employees from exercising their free and untrammeled right to choose their own representative" (R. 281) and as one of "the means aforesaid, to endeavor to deprive its Mechanical Department employes of any

and all right to independent representation for the purpose of collective bargaining." (R. 282.)

In view of this evidence and these findings, the negative portion of the decree finds peculiar justification. The lower courts have restrained the petitioner from making labor agreements with others than the respondent because the petitioner had already been making such agreements in an effort to prevent the employees from freely choosing their own representatives. The lower courts saw in the situation as it had already developed a practical, not a theoretical, danger that the petitioner might continue to contract with a minority for the very purpose (as well as with the necessary effect) of destroying the membership of the respondent and increasing the membership of company unions or minority groups. Thus the prohibition in the decree may be rested exclusively on those paragraphs of the Railway Labor Act which stipulate that "neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives" (Section 2, Third), and that "No carrier, its officers or agents, shall . . . assist [their employees] in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees . . . or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization . . ." (Section 2, Fourth).

It is not denied that these statutory provisions, to which indeed criminal sanctions are attached, create legally enforceable obligations, *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548. And, of course, it is not suggested that to carry these provisions into effect by a decree restraining the petitioner from making labor agreements is beyond the powers of a court of equity. Compare pp. 71–76, *supra.* We submit, therefore, that with respect to the negative obligation the only issue which merits detailed consideration is whether the application of the statute denies due process.

IV

As Applied to the Petitioner the Railway Labor Act Does not Violate the Fifth Amendment

The petitioner contends that both the affirmative (Br. 30–36) and the negative (Br. 37) portions of the decree deprive it of liberty and property without due process of law in violation of the Fifth Amendment. In answering this contention we shall, as heretofore, discuss first the affirmative and then the negative obligation, and in each discussion we shall in turn consider (1) to what extent, if at all, the petitioner is deprived of liberty or property and (2) whether the deprivation, if any, is without due process of law.

A. THE AFFIRMATIVE OBLIGATION DOES NOT DEPRIVE THE PETITIONER OF LIBERTY OR PROPERTY WITHOUT DUE PROCESS OF LAW

In our discussion of the scope of the affirmative portion of the decree, pp. 43–44, *supra,* we have already pointed out that under it the obligation of the carrier is merely to afford to the duly designated representative of its employees an opportunity to be heard on matters which the representative wishes to present, and to take up with the duly designated representative such contractual proposals as the carrier itself determines to offer as the basis of a collective bargaining contract. The petitioner is *not* placed under a duty to enter into a particular agreement, to agree upon particular terms, or to make any contract whatsoever. So the decree has been construed by both lower courts. (R. 274–275, 333.)

1. THE AFFIRMATIVE OBLIGATION DOES NOT DEPRIVE THE PETITIONER OF LIBERTY OR PROPERTY

We cannot see how this limited mandate can be thought to curtail the petitioner's liberty or to take its property. The petitioner does not claim that it is an interference with its liberty for its employees to have a collective representative.[50] Indeed, it has long been recognized that employees are entitled to organize for the purpose of securing the redress of grievances and to promote agreements with em-

[50] The petitioner has repeatedly professed a belief in the principles and practices of collective bargaining. R. 198, fifth full paragraph; R. 232.

ployers relating to rates of pay and conditions of work. *American Steel Foundries* v. *Tri-City Central Trades Council,* 257 U. S. 184, 209." *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548, 570. Nor does the petitioner claim that it has a right to select for its employees this representative of theirs.[51] Of course, it would be preposterous for one principal to claim the right to choose for another principal that principal's agent. Such a suggestion would run counter to accepted rules of agency, would make impossible any genuine bargaining between the parties, and would involve the very sort of conduct condemned by the Court in the *Texas & New Orleans* case. "Freedom of choice in the selection of representatives on each side of the dispute is the essential foundation of the statutory scheme." 281 U. S. 569.

The petitioner's position seems to be (1) that against its will it is being forced to have "business relations" which under the Constitution it is at liberty to refuse (Br. 32), and (2) that it is being forced to listen to contractual proposals although under the Constitution it "cannot be compelled to take the ultimate step represented by the agreement of contract." (Br. 31–32.)

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[51] In the "Sasser statement" the petitioner acknowledges that its employees "are entirely free to exercise their choice of representatives, free from fear or favor from their employer." (R. 199.)

To the first point a complete answer is that the petitioner has already of its own volition, and without compulsion from any source, chosen to have "business relations" with those whom it employs. When the employees' representative meets with the petitioner he comes only on their behalf and comes to discuss only such matters as arise out of an already subsisting business relationship. These meetings may take some of the time of petitioner's officers, but they will take less time than if the employees came individually or *en masse*; and at any rate no one suggests that this consumption of time rises to the dignity of an invasion of the petitioner's constitutional rights.

To the second point we have already given one answer, pp. 75–76, *supra*. The process of treating is preliminary not merely to a possible contract, but also to mediation and voluntary arbitration. Another answer lies in the obvious difference in character between a requirement that a person confer with another and a requirement that he contract with that other. One who confers, unlike one who contracts, is not bound as to any future conduct. His future freedom of action is not thereby restrained.[52]

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[52] Of course if the petitioner goes further than the decree requires and in fact enters into a collective bargaining contract, its freedom of action thereafter will be restrained to some extent. But that will be a consequence of voluntary, uncoerced action on the carrier's part. It is, moreover, a universal consequence of every contract. "To bind, to restrain, is of their very essence." *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238.

A third answer goes even deeper. The petitioner mistakenly assumes that in order to determine whether a person's liberty is curtailed by a decree or statute, the Court will consider not merely what the person is actually required to do, but what he may voluntarily do after he satisfies the requirement.

2. IF THE AFFIRMATIVE OBLIGATION DOES DEPRIVE THE PETITIONER OF LIBERTY OR PROPERTY, THE DEPRIVATION IS NOT WITHOUT DUE PROCESS OF LAW

Although we do not believe that the affirmative obligation in any way does deprive the petitioner of liberty or property, we submit that so far as any deprivation can be discovered, it is not unreasonable, arbitrary or lacking in due process.

In disposing of a somewhat similar point in *Associated Press* v. *National Labor Relations Board,* U. S. Sup. Ct., Oct. Term, 1936, No. 365, pages 94–95, we have already discussed the principle that liberty of contract is not absolute (*Nebbia* v. *New York,* 291 U. S. 502; *Norman* v. *Baltimore & Ohio R. Co.,* 294 U. S. 240), and have reviewed applications of that principle to the employer-employee relationship. Instead of covering the argument and the authorities again, it will be convenient to take as a summary of that whole discussion the following quotation from the *Texas and New Orleans* case (281 U. S. 548, 570):

> . . . Congress may facilitate the amicable settlement of disputes which threaten the

> service of the necessary agencies of interstate transportation. In shaping its legislation to this end, Congress was entitled to take cognizance of actual conditions and to address itself to practicable measures. . .

That quotation has peculiar relevance here. The affirmative obligation to treat was imposed only after a study of "actual conditions". Congress was informed that by disputing the credentials of, and declining to meet with, representatives of their employees, carriers were promoting industrial disputes.[53] In the face of this evil, which as this Court has already observed "often seriously affected the relations between the companies and their employees in the past and is often encountered on the very threshold of controversies between them" (*Pennsylvania R. R. Co.* v. *United States Railroad Labor Board*, 261 U. S. 72, 83), Congress devised machinery intended to "facilitate the amicable settlement of [these] disputes." In this machinery the obligation imposed upon the carrier to treat with the representative of its employees has a double function: first, it gives assurance that there

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[53] As to the situation in the railroad industry in particular see the testimony of George M. Harrison, in the hearings held by the House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess., on H. R. 7650, pp. 78, 79, quoted in respondent's brief, pages 27–29. As to the situation in industry in general see *Monthly Labor Review*, July 1934, p. 75; *ibid*, January 1936, p. 162, where the data show (what is generally admitted) that an employer's refusal to "recognize" and treat with employee representatives is one of the most frequent causes of industrial strife.

will be conferences between the parties before either of them takes precipitate action; and, second, as the lower court has carefully shown (R. 317–318, 333–334), it provides a starting point for the mechanism of mediation and arbitration, if negotiation fails.

Viewed in this setting, the obligation is not arbitrary but is clearly designed to maintain industrial peace on the railroads. And so viewed it cannot be said to lack due process. It is surely not unreasonable to impose upon a carrier a duty to listen and consider the complaints and proposals of employees, presented through their representatives, rather than to leave industrial strife the only form of expression certain to reach the carrier's attention.

Indeed if there were any doubt as to the reasonableness of the conference method, or its effectiveness in eliminating industrial strife, it would be necessary only to turn to the reports of the National Mediation Board issued since the passage of the 1934 amendments to the Railway Labor Act. In the *First Annual Report*, for the year ended June 30, 1935, the Board notes that (p. 8):

> We are pleased to report that during the year there were no strikes in the railroad industry * * * But there has been no lack of labor disputes in the railroad industry. It differs from other industries only in that its disputes are amicably adjusted with the aid of the agencies set up by the act.

And in its *Second Annual Report,* for the year ended June 30, 1936, it is stated (p. 1) that:

> The peaceful adjustment of labor disputes on the railroads that has been maintained since the enactment of the Railway Labor Act in 1926 has not only been continued under the amended law but there has developed a broader spirit of cooperation between men and management that gives promise of an ever increasing tendency to settle disputes on the several properties by the parties themselves without the necessity of intervention by Government agencies.
>
> With the exception of the hasty action on a small industrial railroad of less than 40 employees, who, before ceasing work failed to request mediation in keeping with the intent of the law, there was no strike and no interruption of railroad service on account of labor disputes. All differences were settled peacefully either directly between men and management or by the agencies provided by the Railway Labor Act.
>
> The outstanding manner in which peace has been maintained on the railroads would be no credit to the industry if serious differences did not constantly arise between the carriers and their employees similar to the disputes that break out in strikes in other industries. The fact is, however, that railroads are no different from other industries in the number and character of labor disputes that they have. * * *

B. THE NEGATIVE OBLIGATION DOES NOT DEPRIVE THE PETITIONER OF LIBERTY OR PROPERTY WITHOUT DUE PROCESS OF LAW

In our discussion of the scope of the negative portion of the decree, pp. 44–52, *supra,* we have already pointed out that under it the carrier is restrained merely from making with others than the duly designated representative "labor agreements" relating to rates of pay, rules, or working conditions. The petitioner is *not* restrained in the normal exercise of its right to select or discharge employees. (R. 333.) No part of the decree (a) involves or even sanctions the "closed-shop", (b) prevents any employee or group of employees from presenting grievances "in the usual manner", "in person, by counsel, or by other representatives", or (c) prohibits the petitioner from negotiating with the respondent a labor agreement under which special compensation or consideration will be given to individual employees or groups of employees upon the basis of special skill, seniority or other considerations. See pp. 44–52, *supra.*

1. THE NEGATIVE OBLIGATION DOES NOT DEPRIVE THE PETITIONER OF LIBERTY OR PROPERTY

The petitioner's brief suggests that by this prohibition the carrier is deprived of the right to bargain or contract with individual employees or minorities. (Br. 37.) In presenting this objection the brief makes the highly theoretical assumption

that in the absence of this decree and this Act this carrier would consider minority contracts, for different groups working at the same tasks and in the same place. We submit that this assumption is so plainly contrary to the facts, and so evidently theoretical as to have no merit.

The record in this case shows that the petitioner has for many years negotiated with only one representative on the subject of rates of pay, rules, and working conditions for each craft or class.[34] It has not contracted with minorities and has not manifested any desire to do so in the future. When individuals seek jobs they merely fill out applications to be hired under standard conditions; they do not sign or negotiate any other contracts. (R. 185, 252–253.)

What is true of the petitioner is generally true of the railroad industry. Complete records of all railroads, kept by the National Mediation Board,

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[34] The petitioner stated that "on October 1st, 1922, the shop employees of The Virginian Railway Company organized the Mechanical Department Association, with which *all* past negotiations pertaining to rates of pay, rules and working conditions, have been conducted." (R. 200.) [Italics added.] See also Rule 112 (a) of the existing contract between the petitioner and the Mechanical Department Association which provides (R. 248) that:

"The right of employes to be consulted prior to a decision of the Management adversely effecting [*sic*] their wages or working conditions is hereby agreed to. This right or [*sic*] participation shall be deemed adequately complied with if and when representatives of a majority of the employes of each of the several classes specified in this agreement shall have conferred with the Management."

pursuant to the express mandate of Section 5, Third, (e) of the Act (see footnote 32, page 46, *supra*), show that carriers do not customarily have more than one standard of rates of pay, rules, and working conditions for any particular craft or class. Indeed, multiple contracts would be impractical. The announcement by a carrier of rates of pay, seniority rules, or other rules with respect to working conditions in any craft or class (whether that announcement results from a unilateral decision of the carrier, or from a bilateral "labor agreement") is in fact a formulation of *operating* rules.[55] As such it must be single in order to be integrated with and adjusted to labor rules specified for every other craft or class. Otherwise the railroad system as a whole would not function with the necessary precision and dispatch.

Moreover, aside from the interlocking character of labor regulations, it is plain that the practical reasons why, from the point of view of its own self-interest, a carrier will not tolerate the existence of more than one set of rules or rates for a craft are that (1) existence of a double or triple standard would promote jealousies, injustices and intrigue and would be a constant menace to industrial peace, (2) different seniority arrangements for different groups are mutually inconsistent and

[55] It is interesting to note that in collective contracts in the railroad industry each contractual provision is always referred to as a rule. An example is furnished by the contract in this record. (R. 244–249.)

attempts to reconcile or to interweave them would present great practical difficulties, (3) multiple contracts would complicate the financial accounting for, and the supervision of, each craft, and (4) it would be virtually impossible to lay down any principle determining under which set of rules the carrier should place new men subsequently hired.

In the face of this practical situation we submit that the argument in petitioner's brief that the carrier is by the decree in this case deprived of the liberty to make contracts with minorities lacks realism. The petitioner would never exercise the liberty, no matter how long it possessed it.

We do not understand that the petitioner attempts to argue that some of the petitioner's employees will, as a consequence of the decree, be deprived of liberty or property. The petitioner apparently recognizes that a carrier cannot rely upon alleged infringements of its employees' rights, *Jeffrey Mfg. Co.* v. *Blagg,* 235 U. S. 571, 576; *Erie R. Co.* v. *Williams,* 233 U. S. 685, 697; *Rail & River Coal Co.* v. *Ohio Industrial Commission,* 236 U. S. 338, 349; *Premier-Pabst Sales Co.* v. *Grosscup,* 298 U. S. 226, 227; *Heald* v. *District of Columbia,* 259 U. S. 114, 123. In *Jeffrey Mfg. Co.* v. *Blagg,* 235 U. S. 571, 576, this Court declared:

> Much of the argument is based upon the supposed wrongs to the employe, and the

> alleged injustice and arbitrary character of the legislation here involved as it concerns him alone. * * * No employee is complaining of this act in this case. The argument based upon such discrimination, so far as it affects employees by themselves considered, cannot be decisive; for it is the well-settled rule of this court that it only hears objections to the constitutionality of laws from those who are themselves affected by its alleged unconstitutionality in the feature complained of. *Southern Railway* v. *King*, 217 U. S. 524, 534; *Engel* v. *O'Malley*, 219 U. S. 128, 135; *Standard Stock Food Co.* v. *Wright*, 225 U. S. 540, 550; *Yazoo & Mississippi Valley R. R.* v. *Jackson Vinegar Co.*, 226 U. S. 217, 219; *Rosenthal* v. *New York*, 226 U. S. 260, 271; *Darnell* v. *Indiana*, 226 U. S. 390, 398; *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531, 544; *Missouri, Kansas & Texas Ry.* v. *Cade*, 233 U. S. 642, 648.

The decree below is not directed to any employee. And the failure of any of the employees to intervene or appear as *amici curiae* in any court to oppose the decree warrants an inference that none of them regards himself as prejudiced by it.

But if a claim were made that the individual employee was deprived of liberty, such claim would be without substance. It is true that the decree creates a legal impediment which prevents the petitioner from conferring on the limited

topic [56] of labor agreements with any individual who has not been designated as a craft representative. But so far as any individual employee is concerned this legal impediment is only a duplication of the practical impediments which already existed and to which we have already referred. A minority group on this or any other road would be unlikely ever to get a special contract applied to him alone. From the viewpoint of an individual, whether in the majority or the minority, liberty consists in an opportunity (1) to participate on equal terms in the choice of a spokesman, and (2) to share without discrimination in the benefits of such contract as may be negotiated. The Railway Labor Act (see particularly Section 2, paragraphs Third, Fourth, and Ninth) and the decree in this case assure him of these opportunities. Thus they give to him new liberties, without curtailing any liberty that he ever exercised before.

2. IF THE NEGATIVE OBLIGATION DOES DEPRIVE THE PETITIONER OF LIBERTY OR PROPERTY, THE DEPRIVATION IS NOT WITHOUT DUE PROCESS OF LAW

We have already pointed out, pp. 76–77, *supra*, that the negative obligation may be supported either as an application of Section 2, Ninth and

[56] It will be recalled that the carrier can discuss with any individual employee or group of employees any grievances presented "in the usual manner" "in person" or by representative. See pp. 50–51, *supra*. It will also be recalled that the carrier is at liberty to make individual hirings. See pp. 45–51, *supra*.

Second, or as an application of Section 2, Third and Fourth. Whichever interpretation is taken, we submit that the obligation is not unreasonable, arbitrary or lacking in due process.

Viewed as an application of Section 2, Ninth and Second, the negative obligation has all the justifications to which reference has already been made in the due process discussion of the affirmative obligation, pp. 84–88, *supra*. The machinery established by the Act will not settle disputes if there are numerous conflicting conferences between a carrier and various groups of its employees or individuals working at cross purposes. The prohibition of multiple contracts has also independent justification.

A single bargain as to rates of pay, rules and working conditions promotes peace. An attempt to negotiate or maintain multiple or separate contracts with varying standards would introduce not merely confusion but discord and dissatisfaction. To the group that has the less favorable terms, the other contract appears as discriminatory. To the group that has the more favorable terms, the other contract appears as subversive—a potential threat to its own standards.

Moreover, the mere presence of two or more groups actively functioning is bound to lead each to seek new adherents among newcomers and among those already employed. At best this means proselytism and internecine struggles in which the bargaining power of the employees and, what is

more important, their collective responsibility are reduced. Meetings with the carrier, or appearances before mediatory or arbitral agencies are likely to end in confusion. At worst the situation is exploited by unscrupulous carriers. Favoritism is practiced. An easy means is supplied for coercing those whom the carrier knows belong to one group to abandon their present organization for another association regarded by the carrier as preferable.

To prohibit multiple contracts is to lessen or eliminate such disputes and is therefore obviously germane to the fundamental purpose of the Railway Labor Act—the maintenance of industrial peace upon the railroads of this country.

The reasonableness of the prohibition against multiple contracts, on grounds such as those now advanced, and others earlier stated, pp. 89–93, *supra,* has long been recognized. The United States Railroad Labor Board established under the Transportation Act of 1920, in formulating guiding principles for the settlement of labor disputes on the railroads, recognized the right of the representative of a majority of the craft to make an agreement covering the whole craft. Principle 15 of Decision No. 119.[57] In *Pennsylvania R. R. Co.* v.

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[57] See U. S. Railroad Labor Board Decisions, Vol. II, pp. 87, 96, Decision No. 119, Principle 15, which reads as follows:

"The majority of any craft or class of employees shall have the right to determine what organization shall represent members of such craft or class. Such organization shall have the right to make an agreement which shall apply to all

Labor Board, 261 U. S. 72, 85, this Court held that the rule (while not compulsory under the system then in existence), was "necessary in order that conferences should be properly begun." If such a rule is *necessary* to enable a voluntary collective bargaining system to function, and if (as the *Texas and New Orleans* case holds), a voluntary collective bargaining system is an appropriate means for achieving peace on the railroads, then it follows that such a rule (i. e. majority rule) is reasonable and not in violation of due process.

The petitioner implies (Br. 37) that in some way *Carter* v. *Carter Coal Co.,* 298 U. S. 238, 310–312 is opposed to this result. But even cursory consideration will show that there is no opposition, if indeed there is any relevance. In the *Carter* case there were under review provisions of the bituminous Coal Conservation Act which imposed a penal tax upon coal producers who failed to abide by such maximum hour and minimum wage standards as might be agreed upon by producers of two-thirds of the tonnage and representatives of more than one-half of the miners in a given area. This Court held that these provisions violated the due process clause of the Fifth Amendment because the regulation of hours and wages which they envis-

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employees in such craft or class. No such agreement shall infringe, however; upon the right of employees not members of the organization representing the majority to present grievances either in person or by representatives of their own choice."

aged was "necessarily a governmental function" which could not be delegated to private persons, particularly "private persons whose interests may be and often are adverse to the interests of others in the same business". (298 U. S. 311.)

So far as this petitioner itself is concerned the doctrine of the *Carter* case is entirely irrelevant. This petitioner is not required by the decree or statute to abide by any other person's views as to hours, wages, or other working conditions. No one can prevent the carrier from setting such schedules as it chooses. If, by chance, it chooses to set them cooperatively, that is by collective bargaining, those schedules become purely matters of private contract, not buttressed by criminal, penal, or tax sanctions.

Although the rights and liberties of employees of the petitioner are not in issue in this case, see page 92, *supra,* we may further add that so far as they are concerned the doctrine of the *Carter* case is also irrelevant. It seems to be suggested that an individual worker is denied due process because the governmental power to regulate his hours and wages is delegated to a majority of his co-workers. To this the short answer is that the power exercised by the majority is not a governmental power, and accordingly is not buttressed by penalties. Moreover, the ambit of the bargaining power exercised by the majority under this statute does not go beyond the power that might be exercised in the absence of the statute: as for example by closed

shop contracts which in many states are lawful. Furthermore, the majority's power covers so narrow an area that it does not appreciably narrow free choice. Finally it may be noted that the exclusion from the process of setting standards is as a practical matter not likely to prejudice any individual worker even if he does not change his job. Usually collective bargaining gains more for him than individual bargaining; and it is rare that the representative in whose very selection he has participated develops interests adverse to his own.

Analogous situations in which, in the interest of the public, a minority of those having a common interest are required to accept non-discriminatory terms proposed by a majority of the group, are considered in *Fallbrook Irrigation Co.* v. *Bradley,* 164 U. S. 112; *Wurtz* v. *Hoagland,* 114 U. S. 606; *Doty* v. *Love,* 295 U. S. 64; *Continental Ill. Nat. Bk. & Trust Co.* v. *Chicago, R. I. & P. Ry. Co.,* 294 U. S. 648, 663; *Lauro et al.* v. *Barker et al.,* Oct. Term, 1936, No. 374, Jan. 18, 1937.

So far we have discussed the reasonableness of the negative portion of the decree solely in connection with Section 2, Ninth and Second. But it may also be supported as a reasonable method of carrying out those provisions of the Act which prohibit interference with employees in the free choice of representatives. (Section 2, Third and Fourth.) See pp. 77–80, *supra.*

In the *Texas and New Orleans* case this Court held that the Fifth Amendment was not violated by

decrees, (enforcing Section 2, Third, as it then stood), which required a carrier to dissolve the company union and recognize only the duly designated representative. (See 281 U. S., at 557.) Here the lower court has required the petitioner to treat with the duly designated representative and to contract with no one else. The pattern of the decree is slightly different; but the objective sought is the same and the particular remedy differs merely as the carrier's conduct differs. We, therefore, submit that so far as concerns the question whether the negative obligation deprives the petitioner of liberty or property without due process, *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548, is a controlling precedent and no consideration *de novo* is requisite.

C. THE AFFIRMATIVE AND NEGATIVE OBLIGATIONS ARE SEPARABLE

Throughout our discussion of this Point IV and the preceding Point III we have sharply distinguished between the affirmative obligation and the negative obligation. We have contended that each is authorized by the statute and the Constitution. But, if we are mistaken and one is held either to be unsupported by legally enforceable provisions of the statute or to be lacking in due process, we maintain that the other is separable and valid.

It is clear that the trial court regarded the obligations as separate. This is shown by its para-

graphing of the decree. (R. 282–283.) It is also evident from our prior analysis that the two obligations may be rested on entirely different statutory provisions. All the statutory provisions form valuable adjuncts to the perfect operation of the Railway Act, but each serves a slightly different purpose which has independent value; thus, the requirement that the carrier treat has as its chief purpose the setting in motion of the processes of deliberation and amicable adjustment; whereas the requirement that the carrier shall not make a labor agreement with another than the craft representative is primarily prophylactic, and designed to prevent the carrier from undermining the authority of the representative, from thwarting the employees in their free choice of a representative, and from discriminatory action.

Congress would have intended the negative obligation to be enforced if the affirmative could not, and *vice versa.* This is shown not merely by the separability clause, Section 11 of the Act, which is like the separability clause discussed in the brief filed by the respondent in *Associated Press* v. *National Labor Relations Board,* Oct. Term, 1936, No. 365, pp. 108, *et seq.,* but above all, by *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548, in which an obligation roughly paralleling the negative obligation here involved was enforced without adjudicating the validity of other obligations under the statute. In view of the *Texas* case there can be no question that

each obligation is capable of independent enforcement. Moreover, each is of material value in maintaining that peace on the railway systems of this country that has ever since the 1934 amendments to the Railway Labor Act been virtually unbroken. See pp. 87–88, *supra*.

V

The Norris-LaGuardia Act Does Not Prohibit the Granting of the Injunction Issued Below

Petitioner urges that the injunction issued by the District Court violates several provisions of the Norris-LaGuardia Anti-Injunction Act (Act of March 23, 1932, c. 90, 47 Stat. 70, U. S. C., Title 29, §§ 101–115). It will be clear from a brief reference to the provisions of the Act relied upon that there is no merit to petitioner's contention.

(a). *Section 4 (e)*. It is claimed that the decree violates Section 4 (e) of the Norris-LaGuardia Act, which provides that in any case involving or growing out of a labor dispute no injunction shall be issued prohibiting "giving publicity to the existence of, or the facts involved in, any labor dispute." The decree does not in terms prohibit the giving of publicity to the facts of a dispute—but petitioner argues that the provision restraining it from "discouraging its Mechanical Department employees from becoming or remaining members of the" Federation has the effect of preventing it from making such statements as the Sasser

statement (R. 197–201) to its employees. The decree thus only is alleged to prohibit such statements as would influence the designation of representatives by the employees. It is clear that the issuance of statements to one's employees with the purpose of discouraging them from joining a particular labor organization does not constitute "merely giving publicity to the existence of, or the facts involved in, any labor dispute." "Giving publicity" obviously refers to the making public of information, not to attempts to influence the action of the employees involved in the dispute. Moreover, the Sasser statement, with its derogatory references to the American Federation of Labor and its espousal of the company union, can hardly be regarded as a publication merely of "the existence of or the facts involved in" a labor dispute.

The Norris-LaGuardia Act was not designed to enable employers to interfere with their employees' free choice of representatives under the guise of "giving publicity" to facts. The declaration of policy in Section 2 of the Norris-LaGuardia Act shows clearly that a primary purpose of that Act, as well as of the Railway Labor Act, was to safeguard the right of employees to select their own representatives.[58]

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[58] Section 2 of the Norris-LaGuardia Act declares the public policy of the United States as follows:

"Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to

(b). Sections 6 and 7 (a). These sections provide in substance that no person, association, or organization shall be held responsible for the unlawful acts of another, including the acts of its officers or agents, unless such person, association, or organization shall have actually authorized or ratified the same.[59] Relief in this case was sought against the railway company for acts which were necessarily those of its officers and agents. The trial court found that the petitioner itself had

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protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, *it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection;* therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted." [Italics supplied.]

[59] The pertinent provisions of the sections read as follows:

"Section 6. No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.

"Section 7 (a). * * * no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;"

committed the unlawful acts, through its officers, agents, and servants (R. 182). This finding was clearly supported by the evidence. To take only one example, petitioner's own officers testified that the Sasser statement was passed upon by the President of the Company, its General Solicitor, the Superintendent of Motive Power, and the Assistant to the President having labor matters under his jurisdiction (R. 181, 155).

(c). *Section 9.* This section reads as follows:

> No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute *shall include only a prohibition of such specific act or acts* as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided herein. [Italics supplied.] (March 23, 1932, c. 90, § 9, 47, Stat. 72.)

Petitioner claims that the italicized word "prohibition" was intended to preclude the granting of *mandatory* injunctions in all cases growing out of labor disputes. But "the purpose of this provision" as the Circuit Court of Appeals found (R. 322), "was not to forbid the granting of mandatory injunctions * * * but to limit the scope

of all injunctions in labor cases to matters specifically alleged in the bill and supported in the findings of fact of the court." The evil at which the statute was directed was not the granting of injunctions containing an affirmative command, but the issuing of "blanket injunctions" (R. 323) broader in scope than were warranted by the facts alleged and proved.

Although the Court can dispose of the questions raised under the Norris-LaGuardia Act on the ground that the provisions of the Act were not violated, the Government wishes to suggest a broader basis of decision. This case was brought to enforce certain provisions of the Railway Labor Act. These provisions cannot be enforced if the Norris-LaGuardia Act be regarded as preventing the issuance of mandatory injunctions, or as protecting, as the giving of publicity, the making of influential statements to employees. It clearly was not the purpose of Congress in passing the Anti-Injunction Act in any degree to render unenforceable a specific federal statute designed to achieve the same goal—the protection of the employees' freedom of association. The Norris-LaGuardia Act establishes a general rule applicable to the granting of injunctions in cases growing out of labor disputes. The amended Railway Labor Act, subsequently enacted, imposes specific statutory obligations, some of which are enforceable only by injunction.[60] Under

[60] Section 6 and Section 10, as well as Paragraph Ninth of Section 2, are only enforceable by injunction. See Point III, pp. 40–80, *supra*.

such circumstances, it seems clear that Congress would not have intended the operation of a statute passed to deal with a *specific* problem to be impeded by the application of an earlier law of more general application.[61] See *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S., at 571, in which a similar argument was rejected. *Cf. Callahan* v. *United States*, 285 U. S. 515; *Ex parte United States*, 226 U. S. 420, 424; *Rodgers* v. *United States*, 185 U. S. 83, 87–89.[62]

CONCLUSION

It is respectfully submitted that the judgment of the court below should be affirmed.

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JANUARY 1937.

[61] Section 8 of the Act of June 21, 1934, amending the Railway Labor Act, provides that "All Acts or parts of Acts inconsistent with the provisions of this Act are hereby repealed."

[62] See *International Alliance* v. *Rex Theatre Co.*, 73 F. (2d) 92, in which the Circuit Court of Appeals for the 7th Circuit held that the subsequently enacted and specific provisions of the National Industrial Recovery Act took precedence over the Norris-LaGuardia Act.

APPENDIX

The Railway Labor Act of May 20, 1926, c. 347, 44 Stat. 577, as amended June 21, 1934, c. 691, 48 Stat. 1185, U. S. C., Tit. 45, §§ 151–163. Provisions added to the Act as enacted in 1926 by the 1934 amendments are italicized. Provisions deleted by the 1934 amendments are stricken.

DEFINITIONS

SECTION 1. When used in this Act and for the purposes of this ~~Act:~~ *Act*—

First. The term "carrier" includes any express company, sleeping-car company, ~~and~~ ~~any~~ carrier by railroad, subject to the Interstate Commerce Act, ~~including all floating equipment such as boats, barges, tugs, bridges and ferries; and other transportation facilities used by or operated in connection with any such carrier by railroad, and any receiver or any other individual or body, judicial or otherwise, when in the possession of the business of employers or carriers covered by this Act~~ *and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or*

body, judicial or otherwise, when in the possession of the business of any such "carrier": Provided, however, That the term "carrier" shall not include any street, interurban, or suburban electric ~~railway~~ *railway,* unless such ~~a~~ railway is operating as a part of a general steam railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive ~~power;~~ *power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso*

Second. The term "Adjustment Board" means ~~one of the boards of adjustment provided for in this Act;~~ *the National Railroad Adjustment Board created by this Act.*

Third. The term ~~"Board of Mediation"~~ *"Mediation Board"* means the ~~Board of Mediation~~ *National Mediation Board* created by this ~~Act;~~ *Act.*

Fourth. The term "commerce" means commerce among the several States or between any State, Territory, or the District of Columbia and any foreign nation, or between any Territory or the District of Columbia and any State, or between any Territory and any other Territory, or between any Territory and the District of Columbia, or within any Territory or the District of Columbia, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign nation.

Fifth. The term "employee" as used herein includes every person in the service of a carrier (sub-

ject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is hereby conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however,* That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this Act or by the orders of the Commission.

Sixth. The term "representative" means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them.

~~Sixth.~~ *Seventh.* The term "district court" includes the Supreme Court of the District of Columbia; and the term "circuit court of appeals" includes the Court of Appeals of the District of Columbia.

This Act may be cited as the "Railway Labor Act".

GENERAL PURPOSES

SEC. 2. *The purposes of the Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among em-*

ployees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

GENERAL DUTIES

First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. All disputes between a carrier *or carriers* and its *or their* employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the *carrier or* carriers and by the employees thereof interested in the dispute.

Third. Representatives, for the purposes of this Act, shall be designated by the respective parties ~~in such manner as may be provided in their corporate~~

~~organization or unincorporated association, or by other means of collective action,~~ without interference, influence, or coercion ~~exercised~~ by either party over the ~~self-organization or~~ designation of representatives by the other; *and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.*

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees,

assessments, or other contributions: Provided, That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Fifth. No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this Act, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

~~Fourth.~~ *Sixth.* In case of a dispute between a carrier *or carriers* and its *or their* employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier *or carriers* and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided,* (1) That the place so specified shall be situated upon the ~~railroad~~ line of the carrier involved ~~unless~~ *or as* otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed

twenty days from the receipt of such notice: *And provided further*, That nothing in this ~~paragraph~~ *Act* shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

~~Fifth. Disputes concerning changes in rates of pay, rules, or working conditions shall be dealt with as provided in section 6 and in other provisions of this Act relating thereto.~~

Seventh. No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

Eighth. Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this Act, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing,

within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

Tenth. The willful failure or refusal of any carrier, its officers or agents to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1.000 nor more than $20,000 or imprisonment

for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any district attorney of the United States to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: Provided, That nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

~~Boards~~ *National Board* of Adjustment —Grievances—Interpretation of Agreements

Sec. 3. ~~First. Boards of adjustment shall be created by agreement between any carrier or group of carriers, or the carriers as a whole, and its or their employees.~~

~~The agreement—~~

(~~a~~) ~~Shall be in writing;~~

(~~b~~) ~~Shall state the group or groups of employees covered by such adjustment board;~~

(e) Shall provide that disputes between an employee or group of employees and a carrier, growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, that the dispute shall be referred to the designated adjustment board by the parties, or by either party, with a full statement of the facts and all supporting data bearing upon the dispute;

(d) Shall provide that the parties may be heard either in person, by counsel, or by other representative, as they may respectively elect, and that adjustment boards shall hear and, if possible, decide promptly all disputes referred to them as provided in paragraph (c). Adjustment boards shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in the disputes;

(e) Shall stipulate that decisions of adjustment boards shall be final and binding on both parties to the dispute; and it shall be the duty of both to abide by such decisions;

(f) Shall state the number of representatives of the employees and the number of representatives of the carrier or carriers on the adjustment board, which number of representatives, respectively, shall be equal;

(g) Shall provide for the method of selecting members and filling vacancies;

(h) Shall provide for the portion of expenses to be assumed by the respective parties;

(i) Shall stipulate that a majority of the adjustment board members shall be competent to make an award, unless otherwise mutually agreed;

~~(j) Shall stipulate that adjustment boards shall meet regularly at such times and places as designated; and~~

~~(k) Shall provide for the method of advising the employees and carrier or carriers of the decisions of the board.~~ *First. There is hereby established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after approval of this Act, and it is hereby provided—*

(a) That the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 2 of this Act.

(b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees or through an officer or officers designated for that purpose by such board, trustee or trustees or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one representative on any division of the Board.

(c) The national labor organizations, as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the

division on which each member shall serve; but no labor organization shall have more than one representative on any division of the Board.

(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filled by selection in the same manner as in the original selection.

(e) If either the carriers or the labor organizations of the employees fail to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after the passage of this Act, in case of any original appointment to office of a member of the Adjustment Board, or in case of a vacancy in any such office within thirty days after such vacancy occurs, the Mediation Board shall thereupon directly make the appointment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjust-

ment Board to select a representative. Such representative, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member, investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with section 2 hereof and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding.

(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of (f) of this section shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall con-

sist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, car men, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

(i) The disputes between an employee or group of employees and a carrier or carriers growing out

of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: Provided, however, That final awards as to any such dispute must be made by the entire division as hereinafter provided.

(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof and make an

award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this Act for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board shall be competent to make an award with respect to any dispute submitted to it.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he

is entitled under the award on or before a day named.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

(q) All actions at law based upon the provisions of this section shall be begun within two years from

the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

(r) The several divisions of the Adjustment Board shall maintain headquarters in Chicago, Illinois, meet regularly, and continue in session so long as there is pending before the division any matter within its jurisdiction which has been submitted for its consideration and which has not been disposed of.

(s) Whenever practicable, the several divisions or subdivisions of the Adjustment Board shall be supplied with suitable quarters in any Federal building located at its place of meeting.

(t) The Adjustment Board may, subject to the approval of the Mediation Board, employ and fix the compensations of such assistants as it deems necessary in carrying on its proceedings. The compensation of such employees shall be paid by the Mediation Board.

(u) The Adjustment Board shall meet within forty days after the approval of this Act and adopt such rules as it deems necessary to control proceedings before the respective divisions and not in conflict with the provisions of this section. Immediately following the meeting of the entire Board and the adoption of such rules, the respective divisions shall meet and organize by the selection of a chairman, a vice chairman, and a secretary. Thereafter each division shall annually designate one of its members to act as chairman and one of its members to act as vice chairman: Provided, however, That the chairmanship and vice-chairmanship of any division shall alternate as between the groups, so that

both the chairmanship and vice-chairmanship shall be held alternately by a representative of the carriers and a representative of the employees. In case of a vacancy, such vacancy shall be filled for the unexpired term by the selection of a successor from the same group.

(v) Each division of the Adjustment Board shall annually prepare and submit a report of its activities to the Mediation Board, and the substance of such report shall be included in the annual report of the Mediation Board to the Congress of the United States. The reports of each division of the Adjustment Board and the annual report of the Mediation Board shall state in detail all cases heard, all actions taken, the names, salaries, and duties of all agencies, employees, and officers receiving compensation from the United States under the authority of this Act, and an account of all moneys appropriated by Congress pursuant to the authority conferred by this Act and disbursed by such agencies, employees, and officers.

(w) Any division of the Adjustment Board shall have authority, in its discretion, to establish regional adjustment boards to act in its place and stead for such limited period as such division may determine to be necessary. Carrier members of such regional boards shall be designated in keeping with rules devised for this purpose by the carrier members of the Adjustment Board and the labor members shall be designated in keeping with rules devised for this purpose by the labor members of the Adjustment Board. Any such regional board shall, during the time for which it is appointed, have the same authority to conduct hearings, make

findings upon disputes and adopt the same procedure as the division of the Adjustment Board appointing it, and its decisions shall be enforceable to the same extent and under the same processes. A neutral person, as referee, shall be appointed for service in connection with any such regional adjustment board in the same circumstances and manner as provided in paragraph (1) hereof, with respect to a division of the Adjustment Board.

~~Second. Nothing in this Act shall be construed to prohibit an individual carrier and its employees from agreeing upon the settlement of disputes through such machinery of contract and adjustment as they may mutually establish.~~

Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this Act, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

~~Board of Mediation~~ *National Mediation Board*

Sec. 4. First. *The Board of Mediation is hereby abolished, effective thirty days from the approval of this Act and the members, secretary, officers, assistants,*

employees, and agents thereof, in office upon the date of the approval of this Act, shall continue to function and receive their salaries for a period of thirty days from such date in the same manner as though this Act had not been passed. There is hereby established, as an independent agency in the executive branch of the Government, a board to be known as the ~~Board of Mediation~~ *"National Mediation Board"*, ~~and~~ to be composed of ~~five~~ *three* members appointed by the President, by and with the advice and consent of the Senate, *not more than two of whom shall be of the same political party.* The terms of office of the members first ~~taking office~~ *appointed* shall *begin as soon as the members shall qualify, but not before thirty days after the approval of this Act, and* expire, as designated by the President at the time of nomination, one ~~at the end of the first year, one at the end of the second year, one at the end of the third year, one at the end of the fourth year, and one at the end of the fifth year, after January 1, 1926,~~ *on February 1, 1935, one on February 1, 1936, and one on February 1, 1937.* The terms of office of all successors shall expire ~~five~~ *three* years after the expiration of the terms for which their predecessors were appointed; but any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the unexpired term of his predecessor. Vacancies in the ~~board~~ *Board* shall not impair the powers nor affect the duties of the ~~board~~ *Board* nor of the remaining members of the ~~board~~ *Board*. ~~A majority~~ *Two* of the members in office shall constitute a quorum for the transaction of the business of the ~~board~~ *Board*. Each member of the ~~board~~ *Board* shall receive a salary at the rate of ~~$12,000~~ *$10,000* per

annum, together with necessary traveling ~~expenses~~ and subsistence expenses, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while away from the principal office of the ~~board~~ *Board* on business required by this Act. No person in the employment of or who is pecuniarily or otherwise interested in any organization of employees or any carrier shall enter upon the duties of or continue to be a member of the ~~board~~ *Board*.

All cases referred to the Board of Mediation and unsettled on the date of the approval of this Act shall be handled to conclusion by the Mediation Board.

A member of the ~~board~~ *Board* may be removed by the President for inefficiency, neglect of duty, malfeasance in office, or ineligibility, but for no other cause.

Second. The ~~board~~ *Mediation Board* shall annually designate a member to act as chairman. The ~~board~~ *Board* shall maintain its principal office in the District of Columbia, but it may meet at any other place whenever it deems it necessary *so to do*. The ~~board~~ *Board* may designate one or more of its members to exercise the functions of the ~~board~~ *Board* in mediation proceedings. Each member of the ~~board~~ *Board* shall have power to administer oaths and affirmations. The ~~board~~ *Board* shall have a seal which shall be judicially noticed. The ~~board~~ *Board* shall make an annual report to Congress.

Third. The *Mediation* Board may (1) appoint such experts and assistants to act in a confidential capacity and, subject to the provisions of the civil-service laws, such other officers and ~~employees, and~~ *employees as are essential to the effective transaction of the work of the Board;* (2) in accordance with the

Classification Act of ~~1923~~ *1923*, fix the ~~salary~~ *salaries* of such experts, assistants, officers, and ~~employees,~~ *employees;* and (3) make such expenditures (including expenditures for rent and personal services at the seat of government and elsewhere, for law books, periodicals, and books of reference, and for printing and binding, and including expenditures for salaries and compensation, necessary traveling expenses and expenses actually incurred for subsistence, and other necessary expenses of ~~boards of arbitration, in accordance with the previsions of section 7~~) *the Mediation Board, Adjustment Board, Regional Adjustment Boards established under paragraph (w) of section 3, and boards of arbitration, in accordance with the provisions of this section and sections 3 and 7, respectively*), as may be necessary for the execution of the functions vested in the Board, ~~or~~ *in the Adjustment Board and* in the boards of arbitration, and as may be provided for by the Congress from time to time. All expenditures of the Board shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman.

Fourth. The Mediation Board is hereby authorized by its order to assign, or refer, any portion of its work, business, or functions arising under this or any other Act of Congress, or referred to it by Congress or either branch thereof, to an individual member of the Board or to an employee or employees of the Board to be designated by such order for action thereon, and by its order at any time to amend, modify, supplement, or rescind any such assignment or reference. All such orders shall take effect forthwith and remain in effect until otherwise ordered by the Board. In conformity with and subject to the order or orders of the Medi-

ation Board in the premises, and [sic] such individual member of the Board or employee designated shall have power and authority to act as to any of said work, business, or functions so assigned or referred to him for action by the Board.

Fifth. All officers and employees of the Board of Mediation (except the members thereof, whose offices are hereby abolished) whose services in the judgment of the Mediation Board are necessary to the efficient operation of the Board are hereby transferred to the Board, without change in classification or compensation; except that the Board may provide for the adjustment of such classification or compensation to conform to the duties to which such officers and employees may be assigned.

All unexpended appropriations for the operation of the Board of Mediation that are available at the time of the abolition of the Board of Mediation shall be transferred to the Mediation Board and shall be available for its use for salaries and other authorized expenditures.

FUNCTIONS OF ~~BOARD OF MEDIATION~~ MEDIATION BOARD

SEC. 5. First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the ~~Board of Mediation~~ *Mediation Board* ~~created by this Act, or the Board of Mediation may proffer its services,~~ in any of the following cases:

(a) A dispute ~~arising out of grievances or out of the interpretation or application of agreements~~ concerning *changes in* rates of pay, rules, or working conditions not adjusted by the parties in conference.

~~and not decided by the appropriate adjustment board;~~

~~(b) A dispute which is not settled in conference between the parties, in respect to changes in rates of pay, rules, or working conditions;~~

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

~~(c) Any other dispute not decided in conference between the parties.~~

The Mediation Board may proffer its services in case any labor ~~dispute~~ emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable ~~adjustment~~ *settlement* through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 10 of this Act) to induce the parties to submit their controversy to ~~arbitration~~ *arbitration*, in accordance with the provisions of this Act.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

Second. In any case in which a controversy arises over the meaning or the application of any agreement reached through mediation under the provisions of this Act, either party to the said agreement, or both, may apply to the ~~Board of Mediation~~ *Mediation Board* for an interpretation ~~as to~~ *of* the meaning or application of such agreement. The said Board shall upon receipt of such request notify the parties to the controversy, and after a hearing of both sides give its interpretation within thirty days.

Third. The ~~Board of Mediation~~ *Mediation Board* shall have the following duties with respect to the arbitration of disputes under section 7 of this Act:

(a) On failure ~~of~~ the arbitrators named by the parties to agree on the remaining arbitrator or arbitrators within the time set by section 7 of this Act, it shall be the duty of the ~~Board of Mediation~~ *Mediation Board* to name such remaining arbitrator or arbitrators. It shall be the duty of the Board in naming such arbitrator or arbitrators to appoint only those whom the Board shall deem wholly disinterested in the controversy to be arbitrated and impartial and without bias as between the parties to such arbitration. Should, however, the Board name an arbitrator or arbitrators not so disinterested and impartial, then, upon proper investigation and presentation of the facts, the Board shall promptly remove such arbitrator.

If an arbitrator named by the ~~Board of Mediation~~ *Mediation Board*, in accordance with the provisions of this Act, shall be removed by such Board as provided by this Act, or if such an arbitrator refuses or is unable to serve, it shall be the duty of the ~~Board of Mediation~~ *Mediation Board*, promptly, to select another arbitrator, in the same manner as provided

in this Act for an original appointment by the ~~Board of Mediation~~ *Mediation Board.*

(b) Any member of the ~~Board of Mediation~~ *Mediation Board* is authorized to take the acknowledgment of an agreement ~~of arbitration~~ *to arbitrate* under this Act. When so acknowledged, or when acknowledged by the parties before a notary public or the clerk of a district court or a circuit court of appeals of the United States, such agreement to arbitrate shall be delivered to a member of said ~~board,~~ *Board* or transmitted to said Board, to be filed in its office.

(c) When an agreement to arbitrate has been filed with the ~~Board of Mediation~~ *Mediation Board,* or with one of its members, as provided by this section, and when the said ~~board, or a member thereof,~~ *Board* has been furnished the names of the arbitrators chosen by the parties to the ~~controversy,~~ *controversy* it shall be the duty of the ~~Board of Mediation~~ *Board* to cause a notice in writing to be served upon said arbitrators, notifying them of their appointment, requesting them to meet promptly to name the remaining arbitrator or arbitrators necessary to complete the Board of Arbitration, and advising them of the period within which, as provided by the agreement to arbitrate, they are empowered to name such arbitrator or arbitrators.

(d) Either party to an arbitration desiring the reconvening of a board of arbitration to pass upon any controversy arising over the meaning or application of an award may so notify the ~~Board of Mediation~~ *Mediation Board* in writing, stating in such notice the question or questions to be submitted to such reconvened Board. The ~~Board of Mediation~~ *Mediation Board* shall thereupon promptly communicate

with the members of the Board of Arbitration, or a subcommittee of such Board appointed for such purpose pursuant to a provision in the agreement to arbitrate, and arrange for the reconvening of said Board *of Arbitration* or subcommittee, and shall notify the respective parties to the controversy of the time and place at which the Board, or the subcommittee, will meet for hearings upon the matters in controversy to be submitted to it. No evidence other than that contained in the record filed with the original award shall be received or considered by such reconvened Board or subcommittee, except such evidence as may be necessary to illustrate the interpretations suggested by the parties. If any member of the original Board is unable or unwilling to serve on such reconvened Board or subcommittee thereof, another arbitrator shall be named in the same manner and with the same powers and duties as such original arbitrator.

~~(c) The Interstate Commerce Commission, the Bureau of Labor Statistics, and the custodian of the records, respectively, of the Railroad Labor Board, of the mediators designated in the Act approved June 1, 1898, providing for mediation and arbitration, known as the Erdman Act, and of the Board of Mediation and Conciliation created by the Act approved July 15, 1913, providing for mediation, conciliation, and arbitration, known as the Newlands Act, are hereby authorized and directed to transfer and deliver to the Board of Mediation created by this Act any and all papers and documents heretofore filed with or transferred to them, respectively, bearing upon the settlement, adjustment, or determination of disputes between carriers and their employees or upon mediation or arbitration pro-~~

~~eedings held under or pursuant to the provisions of any Act of Congress in respect to such di utes; and the President is authorized to require the transfer and delivery to the Board of Mediation, created by this Act, of any and all such papers and documents filed with or in the possession of any agency of the Government. The President is authorized to designate a custodian of the records and property of the Railroad Labor Board, until the transfer and delivery of such records to the Board of Mediation and the disposition of such property in such manner as the President may direct.~~

(e) Within sixty days after the approval of this Act every carrier shall file with the Mediation Board a copy of each contract with its employees in effect on the 1st day of April 1934, covering rates of pay, rules, and working conditions. If no contract with any craft or class of its employees has been entered into, the carrier shall file with the Mediation Board a statement of that fact including also a statement of the rates of pay, rules, and working conditions applicable in dealing with such craft or class. When any new contract is executed or change is made in an existing contract with any class or craft of its employees covering rates of pay, rules, or working conditions, or in those rates of pay, rules, and working conditions of employees not covered by contract, the carrier shall file the same with the Mediation Board within thirty days after such new contract or change in existing contract has been executed or rates of pay, rules, and working conditions have been made effective.

(f) The Mediation Board shall be the custodian of all papers and documents heretofore filed with or transferred to the Board of Mediation bearing

upon the settlement, adjustment, or determination of disputes between carriers and their employees or upon mediation or arbitration proceedings held under or pursuant to the provisions of any Act of Congress in respect thereto; and the President is authorized to designate a custodian of the records and property of the Board of Mediation until the transfer and delivery of such records to the Mediation Board and to require the transfer and delivery to the Mediation Board of any and all such papers and documents filed with it or in its possession.

~~PROCEDURE IN CHANGING RATES OF PAY, RULES, AND WORKING CONDITIONS~~

SEC. 6. Carriers and ~~the~~ representatives of the employees shall give at least thirty days' written notice of an intended change *in agreements* affecting rates of pay, rules, or working conditions, and the time and place for *the beginning of* conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. ~~Should changes be requested from more than one class or associated classes at approximately the same time, this date for the conference shall be understood to apply only to the first conference for each class; it being the intent that subsequent conferences in respect to each request shall be held in the order of its receipt and shall follow each other with reasonable promptness.~~ In every case where such notice of intended change has been given, or conferences are

being held with reference thereto, or the services of the ~~Board of Mediation~~ *Mediation Board* have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted ~~upon,~~ *upon* as required by section 5 of this Act, by the ~~Board of Mediation,~~ *Mediation Board,* unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the ~~Board of Mediation~~ *Mediation Board.*

ARBITRATION

SEC. 7. First. Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in the manner provided in the preceding sections, such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a board of three (or, if the parties to the controversy so stipulate, of six) persons: *Provided, however,* That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this Act or otherwise.

Second. Such board of arbitration shall be chosen in the following manner:

(a) In the case of a board of three the carrier or carriers and the representatives of the employees, parties, respectively, to the agreement to arbitrate, shall each name one arbitrator; the two arbitrators thus chosen shall select a third arbitrator. If the

arbitrators chosen by the parties shall fail to name the third arbitrator within five days after their first meeting, such third arbitrator shall be named by the ~~Board of Mediation~~ *Mediation Board.*

(b) In the case of a board of six the carrier or carriers and the representatives of the employees, parties respectively to the agreement to arbitrate, shall each name two arbitrators; the four arbitrators thus chosen shall, by a majority vote, select the remaining two arbitrators. If the arbitrators chosen by the parties shall fail to name the two arbitrators within fifteen days after their first meeting, the said two arbitrators, or as many of them as have not been named, shall be named by the ~~Board of Mediation~~ *Mediation Board.*

Third. (a) When the arbitrators selected by the respective parties have agreed upon the remaining arbitrator or arbitrators, they shall notify the ~~Board of Mediation~~ *Mediation Board;* and, in the event of their failure to agree upon any or upon all of the necessary arbitrators within the period fixed by this Act, they shall, at the expiration of such period, notify the ~~Board of Mediation~~ *Mediation Board* of the arbitrators selected, if any, or of their failure to make or to complete such selection.

(b) The board of arbitration shall organize and select its own chairman and make all necessary rules for conducting its hearings: *Provided, however,* That the board of arbitration shall be bound to give the parties to the controversy a full and fair hearing, which shall include an opportunity to present evidence in support of their claims, and an opportunity to present their case in person, by counsel, or by other representative as they may respectively elect.

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(c) Upon notice from the ~~Board of Mediation~~ *Mediation Board* that the parties, or either party, to an arbitration desire the reconvening of the board of arbitration (or a subcommittee of such board of arbitration appointed for such purpose pursuant to the agreement to arbitrate) to pass upon any controversy over the meaning or application of their award, the board, or its subcommittee, shall at once reconvene. No question other than, or in addition to, the questions relating to the meaning or application of the award, submitted by the party or parties in writing, shall be considered by the reconvened board of arbitration or its subcommittee.

Such rulings shall be acknowledged by such board or subcommittee thereof in the same manner, and filed in the same district court clerk's office, as the original award and become a part thereof.

(d) No arbitrator, except those chosen by the ~~Board of Mediation~~ *Mediation Board*, shall be incompetent to act as an arbitrator because of his interest in the controversy to be arbitrated, or because of his connection with or partiality to either of the parties to the arbitration.

(e) Each member of any board of arbitration created under the provisions of this Act named by either party to the arbitration shall be compensated by the party naming him. Each arbitrator selected by the arbitrators or named by the ~~Board of Mediation~~ *Mediation Board* shall receive from the ~~Board of Mediation~~ *Mediation Board* such compensation as the ~~Board of Mediation~~ *Mediation Board* may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, while serving as an arbitrator.

(f) The board of arbitration shall furnish a certified copy of its award to the respective parties to the controversy, and shall transmit the original, together with the papers and proceedings and a transcript of the evidence taken at the hearings, certified under the hands of at least a majority of the arbitrators, to the clerk of the district court of the United States for the district wherein the controversy arose or the arbitration is entered into, to be filed in said clerk's office as hereinafter provided. The said board shall also furnish a certified copy of its award, and the papers and proceedings, including testimony relating thereto, to the ~~Board of Mediation~~ *Mediation Board*, to be filed in its office; and in addition a certified copy of its award shall be filed in the office of the Interstate Commerce Commission: *Provided, however*, That such award shall not be construed to diminish or extinguish any of the powers or duties of the Interstate Commerce Commission, under the Interstate Commerce Act, as amended.

(g) A board of arbitration may, subject to the approval of the ~~Board of Mediation~~ *Mediation Board*, employ and fix the compensation of such assistants as it deems necessary in carrying on the arbitration proceedings. The compensation of such employees, together with their necessary traveling expenses and expenses actually incurred for subsistence, while so employed, and the necessary expenses of boards of arbitration, shall be paid by the ~~Board of Mediation~~ *Mediation Board*.

Whenever practicable, the board shall be supplied with suitable quarters in any Federal building located at its place of meeting or at any place where the board may conduct its proceedings or deliberations.

(h) All testimony before said board shall be given under oath or affirmation, and any member of the board shall have the power to administer oaths or affirmations. The board of arbitration, or any member thereof, shall have the power to require the attendance of witnesses and the production of such books, papers, contracts, agreements, and documents as may be deemed by the board of arbitration material to a just determination of the matters submitted to its arbitration, and may for that purpose request the clerk of the district court of the United States for the district wherein said arbitration is being conducted to issue the necessary subpoenas, and upon such request the said clerk or his duly authorized deputy shall be, and he hereby is, authorized, and it shall be his duty, to issue such subpoenas. In the event of the failure of any person to comply with any such subpoena, or in the event of the contumacy of any witness appearing before the board of arbitration, the board may invoke the aid of the United States courts to compel witnesses to attend and testify and to produce such books, papers, contracts, agreements, and documents to the same extent and under the same conditions and penalties as provided for in the Act to regulate commerce approved February 4, 1887, and the amendments thereto.

Any witness appearing before a board of arbitration shall receive the same fees and mileage as witnesses in courts of the United States, to be paid by the party securing the subpoena.

SEC. 8. Approved May 20, 1926. The agreement to arbitrate—

(a) Shall be in writing;

(b) Shall stipulate that the arbitration is had under the provisions of this Act;

(c) Shall state whether the board of arbitration is to consist of three or of six members;

(d) Shall be signed by the duly accredited representatives of the carrier or carriers and the employees, parties respectively to the agreement to arbitrate, and shall be acknowledged by said parties before a notary public, the clerk of a district court or circuit court of appeals of the United States, or before a member of the ~~Board of Mediation~~ *Mediation Board*, and, when so acknowledged, shall be filed in the office of the ~~Board of Mediation~~ *Mediation Board;*

(e) Shall state specifically the questions to be submitted to the said board for decision; and that, in its award or awards, the said board shall confine itself strictly to decisions as to the questions so specifically submitted to it;

(f) Shall provide that the questions, or any one or more of them, submitted by the parties to the board of arbitration may be withdrawn from arbitration on notice to that effect signed by the duly accredited representatives of all the parties and served on the board of arbitration;

(g) Shall stipulate that the signatures of a majority of said board of arbitration affixed to their award shall be competent to constitute a valid and binding award;

(h) Shall fix a period from the date of the appointment of the arbitrator or arbitrators necessary to complete the board (as provided for in the agreement) within which the said board shall commence its hearings;

(i) Shall fix a period from the beginning of the hearings within which the said board shall make and file its award: *Provided,* That the parties may agree at any time upon an extension of this period;

(j) Shall provide for the date from which the award shall become effective and shall fix the period during which the award shall continue in force;

(k) Shall provide that the award of the board of arbitration and the evidence of the proceedings before the board relating thereto, when certified under the hands of at least a majority of the arbitrators, shall be filed in the clerk's office of the district court of the United States for the district wherein the controversy arose or the arbitration was entered into, which district shall be designated in the agreement; and, when so filed, such award and proceedings shall constitute the full and complete record of the arbitration;

(l) Shall provide that the award, when so filed, shall be final and conclusive upon the parties as to the facts determined by said award and as to the merits of the controversy decided;

(m) Shall provide that any difference arising as to the meaning, or the application of the provisions, of an award made by a board of arbitration shall be referred back for a ruling to the same board, or, by agreement, to a subcommittee of such board; and that such ruling, when acknowledged in the same manner, and filed in the same district court clerk's office, as the original award, shall be a part of and shall have the same force and effect as such original award; and

(n) Shall provide that the respective parties to the award will each faithfully execute the same.

The said agreement to arbitrate, when properly signed and acknowledged as herein provided, shall not be revoked by a party to such agreement: *Provided, however,* That such agreement to arbitrate may at any time be revoked and canceled by the written agreement of both parties, signed by their duly accredited representatives, and (if no board of arbitration has yet been constituted under the agreement) delivered to the ~~Board of Mediation~~ *Mediation Board* or any member thereof; or, if the board of arbitration has been constituted as provided by this Act, delivered to such board of arbitration.

Sec. 8. Approved June 21, 1934. If any section, subsection, sentence, clause, or phrase of this Act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this Act. All Acts or parts of Acts inconsistent with the provisions of this Act are hereby repealed.

SEC. 9. First. The award of a board of arbitration, having been acknowledged as herein provided, shall be filed in the clerk's office of the district court designated in the agreement to arbitrate.

Second. An award acknowledged and filed as herein provided shall be conclusive on the parties as to the merits and facts of the controversy submitted to arbitration, and unless, within ten days after the filing of the award, a petition to impeach the award, on the grounds hereinafter set forth, shall be filed in the clerk's office of the court in which the award has been filed, the court shall enter judgment on the award, which judgment shall be final and conclusive on the parties.

Third. Such petition for the impeachment or contesting of any award so filed shall be entertained

by the court only on one or more of the following grounds:

(a) That the award plainly does not conform to the substantive requirements laid down by this Act for such awards, or that the proceedings were not substantially in conformity with this Act;

(b) That the award does not conform, nor confine itself, to the stipulations of the agreement to arbitrate; or

(c) That a member of the board of arbitration rendering the award was guilty of fraud or corruption; or that a party to the arbitration practiced fraud or corruption which fraud or corruption affected the result of the arbitration: *Provided, however,* That no court shall entertain any such petition on the ground that an award is invalid for uncertainty; in such case the proper remedy shall be a submission of such award to a reconvened board, or subcommittee thereof, for interpretation, as provided by this Act: *Provided further,* That an award contested as herein provided shall be construed liberally by the court, with a view to favoring its validity, and that no award shall be set aside for trivial irregularity or clerical error, going only to form and not to substance.

Fourth. If the court shall determine that a part of the award is invalid on some ground or grounds designated in this section as a ground of invalidity, but shall determine that a part of the award is valid, the court shall set aside the entire award: *Provided, however,* That, if the parties shall agree thereto, and if such valid and invalid parts are separable, the court shall set aside the invalid part, and order judgment to stand as to the valid part.

Fifth. At the expiration of ten days from the decision of the district court upon the petition filed as aforesaid, final judgment shall be entered in accordance with said decision, unless during said ten days either party shall appeal therefrom to the circuit court of appeals. In such case only such portion of the record shall be transmitted to the appellate court as is necessary to the proper understanding and consideration of the questions of law presented by said petition and to be decided.

Sixth. The determination of said circuit court of appeals upon said questions shall be final, and, being certified by the clerk thereof to said district court, judgment pursuant thereto shall thereupon be entered by said district court.

Seventh. If the petitioner's contentions are finally sustained, judgment shall be entered setting aside the award in whole or, if the parties so agree, in part; but in such case the parties may agree upon a judgment to be entered disposing of the subject matter of the controversy, which judgment when entered shall have the same force and effect as judgment entered upon an award.

Eighth. Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor or service by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

EMERGENCY BOARD

SEC. 10. If a dispute between a carrier and its employees be not adjusted under the foregoing pro-

visions of this Act and should, in the judgment of the ~~Board of Mediation~~ *Mediation Board,* threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the ~~Board of Mediation~~ *Mediation Board* shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may seem desirable: *Provided, however,* That no member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation.

There is hereby authorized to be appropriated such sums as may be necessary for the expenses of such board, including the compensation and the necessary traveling expenses and expenses actually incurred for subsistence, of the members of the board. All expenditures of the board shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman.

After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose.

GENERAL PROVISIONS

SEC. 11. If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act, and the application of such provision to other persons or circumstances, shall not be affected thereby.

SEC. 12. There is hereby authorized to be appropriated such sums as may be necessary for expenditure by the ~~Board of Mediation~~ *Mediation Board* in carrying out the provisions of this Act.

SEC. 13. (a) Paragraph "Second" of subdivision (b) of section 128 of the Judicial Code, as amended, is amended to read as follows:

"Second. To review decisions of the district courts, under section 9 of the Railway Labor Act."

(b) Section 2 of the Act entitled "An Act to amend the Judicial Code, and to further define the jurisdiction of the circuit court of appeals and of the Supreme Court, and for other purposes," approved February 13, 1925, is amended to read as follows:

"SEC. 2. That cases in a circuit court of appeals under section 9 of the Railway Labor Act; under section 5 of 'An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes,' approved September 26, 1914; and under section 11 of 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914, are included among the cases to which sections 239 and 240 of the Judicial Code shall apply."

SEC. 14. Title III of the Transportation Act, 1920, and the Act approved July 15, 1913, providing

for mediation, conciliation, and arbitration, and all Acts and parts of Acts in conflict with the provisions of this Act are hereby repealed, except that the members, secretary, officers, employees, and agents of the Railroad Labor Board, in office upon the date of the passage of this Act, shall receive their salaries for a period of 30 days from such date, in the same manner as though this Act had not been passed.

U. S. GOVERNMENT PRINTING OFFICE: 1937

SUPREME COURT OF THE UNITED STATES.

No. 324.—October Term, 1936.

The Virginian Railway Company, Petitioner, *vs.* System Federation No. 40, Railway Employees Department of the American Federation of Labor, etc., et al. } Certiorari to the Circuit Court of Appeals for the Fourth Circuit.

[March 29, 1937.]

Mr. Justice Stone delivered the opinion of the Court.

This case presents questions as to the constitutional validity of certain provisions of the Railway Labor Act of May 20, 1926, c. 347, 44 Stat. 577, as amended by the Act of June 21, 1934, c. 691, 48 Stat. 1185, 45 U. S. C. §§ 151-163, and as to the nature and extent of the relief which courts are authorized by the Act to give.

Respondents are System Federation No. 40, which will be referred to as the Federation, a labor organization affiliated with the American Federation of Labor and representing shop craft employees of petitioner railway, and certain individuals who are officers and members of the System Federation. They brought the present suit in equity in the District Court for Eastern Virginia, to compel petitioner, an interstate rail carrier, to recognize and treat with respondent Federation, as the duly accredited representative of the mechanical department employees of petitioner, and to restrain petitioner from in any way interfering with, influencing or coercing its shop craft employees in their free choice of representatives, for the purpose of contracting with petitioner with respect to rules, rates of pay and working conditions, and for the purpose of considering and settling disputes between petitioner and such employees.

The history of this controversy goes back to 1922, when, following the failure of a strike by petitioner's shop employees affiliated with the American Federation of Labor, other employees organized a local union known as the "Mechanical Department Association of the Virginian Railway." The Association thereupon entered into

an agreement with petitioner, providing for rates of pay and working conditions, and for the settlement of disputes with respect to them, but no substantial grievances were ever presented to petitioner by the Association. It maintained its organization and held biennial elections of officers, but the notices of election were sent out by petitioner and all Association expenses were paid by petitioner.

In 1927 the American Federation of Labor formed a local organization, which, in 1934, demanded recognition by petitioner of its authority to represent the shop craft employees, and invoked the aid of the National Mediation Board, constituted under the Railway Labor Act as amended, to establish its authority. The Board, pursuant to agreement between the petitioner, the Federation, and the Association, and in conformity to the statute, held an election by petitioner's shop craft employees, to choose representatives for the purpose of collective bargaining with petitioner. As the result of the election, the Board certified that the Federation was the duly accredited representative of petitioner's employees in the six shop crafts.

Upon this and other evidence, not now necessary to be detailed, the trial court found that the Federation was the duly authorized representative of the mechanical department employees of petitioner, except the carmen and coach cleaners; that the petitioner, in violation of § 2 of the Railway Labor Act, had failed to treat with the Federation as the duly accredited representative of petitioner's employees; that petitioner had sought to influence its employees against any affiliation with labor organizations other than an association maintained by petitioner, and to prevent its employees from exercising their right to choose their own representative; that for that purpose, following the certification, by the National Mediation Board, of the Federation, as the duly authorized representative of petitioner's mechanical department employees, petitioner had organized the Independent Shop Craft Association of its shop craft employees, and had sought to induce its employees to join the independent association, and to put it forward as the authorized representative of petitioner's employees.[1]

[1] The court found that after the certification by the Mediation Board "the defendant, by and through its officers, agents and servants, undertook by means of the circulation of a petition or petitions addressed to the National Mediation Board to have the certification of the National Mediation Board aforesaid altered, changed or revoked so as to deprive its Mechanical

Upon the basis of these findings the trial court gave its decree applicable to petitioner's mechanical department employees except the carmen and coach cleaners. It directed petitioner to "treat with" the Federation and to "exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, ..." It restrained petitioner from "entering into any contract, undertaking or agreement of whatsoever kind concerning rules, rates of pay or working conditions affecting its Mechanical Department employees, . . . except . . . with the Federation", and from "interfering with, influencing or coercing" its employees with respect to their free choice of representatives "for the purpose of making and maintaining contracts" with petitioner "relating to rules, rates of pay and working conditions or for the purpose of considering and deciding disputes between the Mechanical Department employees" and petitioner. The decree further restrained the petitioner from organizing or fostering any union of its mechanical department employees for the purpose of interfering with the Federation as the accredited representative of such employees. 11 F. Supp. 621.

On appeal the Court of Appeals for the Fourth Circuit approved and adopted the findings of the district court and affirmed its decree. 84 F. (2d) 641. This Court granted certiorari to review the cause as one of public importance. — U. S. —.

Petitioner here, as below, makes two main contentions: First, with respect to the relief granted, it maintains that § 2, Ninth, of the Railway Labor Act, which provides that a carrier shall treat with those certified by the Mediation Board to be the representatives of a craft or class, imposes no legally enforcible obligation upon the carrier to negotiate with the representative so certified, and that in any case the statute imposes no obligation to treat or negotiate

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Department employes of the right to representation by said System Federation No. 40, Railway Employes Department of the American Federation of Labor, so designated as aforesaid, and thereafter did cause to be organized the Independent Shop Crafts Association by individual Mechanical Department employes by circulating or causing to be circulated applications for membership in said Independent Shop Crafts Association notwithstanding the certification as aforesaid by the National Mediation Board of said System Federation No. 40, Railway Employes Department of the American Federation of Labor, as the authorized representative of its Mechanical Department employes, . . ."

which can be appropriately enforced by a court of equity. Second, that § 2, Ninth, in so far as it attempts to regulate labor relations between petitioner and its "back shop" employees, is not a regulation of interstate commerce authorized by the commerce clause because, as it asserts, they are engaged solely in intrastate activities; and that so far as it imposes on the carrier any obligation to negotiate with a labor union authorized to represent its employees, and restrains it from making agreements with any other labor organization, it is a denial of due process guaranteed by the Fifth Amendment. Other minor objections to the decree, so far as relevant to our decision, will be referred to later in the course of this opinion.

The concurrent findings of fact of the two courts below are not shown to be plainly erroneous or unsupported by evidence. We accordingly accept them as the conclusive basis for decision, *Texas & N. O. R. Co.* v. *Brotherhood of Railway & S. S. Clerks*, 281 U. S. 548, 558; *Pick Mfg. Co.* v. *General Motors Corporation*, 299 U. S. 3, 4, and address ourselves to the questions of law raised on the record.

First. The Obligation Imposed by the Statute. By Title III of the Transportation Act of February 28, 1920, c. 91, 41 Stat. 456, 469, Congress set up the Railroad Labor Board as a means for the peaceful settlement, by agreement or by arbitration, of labor controversies between interstate carriers and their employees. It sought "to encourage settlement without strikes, first by conference between the parties; failing that, by reference to adjustment boards of the parties' own choosing, and if this is ineffective, by a full hearing before a National Board . . . ." *Pennsylvania R. Co.* v. *Railroad Labor Board*, 261 U. S. 72, 79. The decisions of the Board were supported by no legal sanctions. The disputants were not "in any way to be forced into compliance with the statute or with the judgments pronounced by the Labor Board, except through the effect of adverse public opinion." *Pennsylvania Federation* v. *Pennsylvania R. Co.*, 267 U. S. 203, 216.

In 1926 Congress, aware of the impotence of the Board, and of the fact that its authority was generally not recognized or respected by the railroads or their employees, made a fresh start toward the peaceful settlement of labor disputes affecting railroads, by the repeal of the 1920 Act and the adoption of the Railway Labor Act. Report, Senate Committee on Interstate Commerce, No. 222, 69th

Cong., 1st Sess. *Texas & N. O. R. Co.* v. *Brotherhood of Railway & S. S. Clerks, supra,* 563. By the new measure Congress continued its policy of encouraging the amicable adjustment of labor disputes by their voluntary submission to arbitration before an impartial board, but it supported that policy by the imposition of legal obligations. It provided means for enforcing the award obtained by arbitration between the parties to labor disputes. § 9. In certain circumstances it prohibited any change in conditions, by the parties to an unadjusted labor dispute, for a period of thirty days, except by agreement. § 10. It recognized their right to designate representatives for the purposes of the Act "without interference, influence or coercion exercised by either party over the self-organization or designation of representatives by the other." § 2, Third. Under the last-mentioned provision this Court held, in the *Railway Clerks* case, *supra,* that employees were free to organize and to make choice of their representatives without the "coercive interference" and "pressure" of a company union organized and maintained by the employer; and that the statute protected the freedom of choice of representatives, which was an essential of the statutory scheme, with a legal sanction which it was the duty of courts to enforce by appropriate decree.

The prohibition against such interference was continued and made more explicit by the amendment of 1934.[2] Petitioner does not challenge that part of the decree which enjoins any interference by it with the free choice of representatives by its employees, and the fostering, in the circumstances of this case, of the company union. That contention is not open to it in view of our decision in the *Railway Clerks* case, *supra,* and of the unambiguous language of § 2, Third, and Fourth, of the Act, as amended.

But petitioner insists that the statute affords no legal sanction for so much of the decree as directs petitioner to "treat with" re-

[2] Section 2 of the Act, as amended in 1934, declares that its purposes, among others, are "(2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization;" and "(3) to provide for the complete independence of carriers and of employees in the matter of self-organization and to carry out the purposes of this Act." The section was also amended to provide that "neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives;" § 2, Third, and that "it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization . . . or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization", § 2, Fourth.

spondent Federation "and exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes whether arising out of the application of such agreements or otherwise." It points out that the requirement for reasonable effort to reach an agreement is couched in the very words of § 2, First, which were taken from § 301 of the Transportation Act, and which were held to be without legal sanction in that Act. *Pennsylvania Federation* v. *Pennsylvania R. Co., supra,* 215. It is argued that they cannot now be given greater force as reenacted in the Railway Labor Act of 1926, and continued in the 1934 amendment. But these words no longer stand alone and unaided by mandatory provision of the statute as they did when first enacted. The amendment of the Railway Labor Act added new provisions in § 2, Ninth, which makes it the duty of the Mediation Board, when any dispute arises among the carrier's employees, "as to who are the representatives of such employees," to investigate the dispute and to certify, as was done in this case, the name of the organization authorized to represent the employees. It commands that "Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act."

It is, we think, not open to doubt that Congress intended that this requirement be mandatory upon the railroad employer, and that its command, in a proper case, be enforced by the courts. The policy of the Transportation Act of encouraging voluntary adjustment of labor disputes, made manifest by those provisions of the Act which clearly contemplated the moral force of public opinion as affording its ultimate sanction, was, as we have seen, abandoned by the enactment of the Railway Labor Act. Neither the purposes of the later Act, as amended, nor its provisions when read, as they must be, in the light of our decision in the *Railway Clerks* case, *supra,* lend support to the contention that its enactments, which are mandatory in form and capable of enforcement by judicial process, were intended to be without legal sanction.[3]

[3] The 1934 amendment imposed various other obligations upon the carrier, to which criminal penalties were attached [§ 2, Tenth]—*e. g.*, prohibitions against helping unions, by contributions of funds, or assistance in the collection of dues, § 2, Fourth; against requiring employees to promise to join or not to join a labor union, § 2, Fifth; against changing rates of pay, etc., without specifying a conference upon thirty days' notice, § 2, Seventh; and see the requirement that the carrier post notices that all disputes will be determined in accordance with the Act, § 2, Eighth.

Experience had shown, before the amendment of 1934, that when there was no dispute as to the organizations authorized to represent the employees, and when there was willingness of the employer to meet such representative for a discussion of their grievances, amicable adjustment of differences had generally followed and strikes had been avoided.[4] On the other hand, a prolific source of dispute had been the maintenance by the railroads of company unions and the denial by railway management of the authority of representatives chosen by their employees. Report of House Committee on Interstate and Foreign Commerce, No. 1944, 73rd Cong., 2d Sess., pp. 1-2.[5] Section 2, Ninth, of the amended Act, was specifically aimed at this practice. It provided a means for ascertaining who are the authorized representatives of the employees through intervention and certification by the Mediation Board, and commanded the carrier to treat with the representative so certified. That the command was limited in its application to the case of intervention and certification by the Mediation Board indi-

[4] In the first two years after the enactment of the Railway Labor Act of 1926, 363 cases concerning rates of pay, rules or working conditions were submitted to the United States Board of Mediation, and about 25% of these were withdrawn by the parties. Yet, during the same period, more than 600 direct and voluntary settlements were negotiated. See United States Board of Mediation, First Annual Report, For the Fiscal Year Ended June 30, 1927, pp. 10-11; Second Annual Report, For the Fiscal Year Ended June 30, 1928, pp. 11, 58-59. Compare National Mediation Board, Second Annual Report, For the Fiscal Year Ended June 30, 1936, at p. 1: "For every dispute submitted to . . . these Boards, there were many others considered and settled in conferences between representatives of carriers and of the employees as required by section 2, second, of the Act."

See also testimony of William M. Leiserson, Chairman of the National Mediation Board until February 1, 1937, at Hearing by National Labor Relations Board in the case of Jones & Laughlin Steel Corporation [No. 419, October Term, 1936]: "If we have a threat of a strike now [on the railroads] it might be on a big fundamental question, like wages and hours, and we usually find we can settle those by arbitration or otherwise. . . . But if the issues involved were discrimination or discharge of men because they had joined the organization, or the question would be the right of the organization to represent them, we could not have settled those strikes." See Governmental Protection of Labor's Right to Organize, National Labor Relations Board, Division of Economic Research, Bull. No. 1, August, 1936, pp. 17-18.

[5] See also statement by Representative Crosser, in charge of the bill on the floor, in Hearings, House Committee on Rules, 73d Cong., 2d Sess., on H. R. 9861, pp. 10-11, 13: "The purpose of the bill is . . . [inter alia] to outlaw the attempt that has been made in numerous instances by employers who control alleged labor unions, and thereby, to use a slang phrase, to 'gum up the works'. . . . We have had 8 years of operation of this act, and we have prevented any strikes. But strikes have been threatened because of the defects which have been found in this bill."

Under the 1926 Act disputes over the designation of employee representatives could be dealt with by the old United States Mediation Board only by agreement of the parties. The carriers agreed to an election conducted by the

cates not that its words are precatory, but only that Congress hit at the evil "where experience shows it to be most felt." *Keokee Coke Co.* v. *Taylor*, 234 U. S. 224, 227.

Petitioner argues that the phrase "treat with" must be taken as the equivalent of "treat" in its intransitive sense, as meaning "regard" or "act towards", so that compliance with its mandate requires the employer to meet the authorized representative of the employees only if and when he shall elect to negotiate with them. This suggestion disregards the words of the section, and ignores the plain purpose made manifest throughout the numerous provisions of the Act. Its major objective is the avoidance of industrial strife, by conference between the authorized representatives of employer and employee. The command to the employer to "treat with" the authorized representative of the employees adds nothing to the 1926 Act, unless it requires some affirmative act on the part of the employer. Compare the *Railway Clerks* case, *supra*. As we cannot assume that its addition to the statute was purposeless, we must take its meaning to be that which the words suggest, which alone would add something to the statute as it was before amendment, and which alone would tend to effect the purpose of the legislation. The statute does not undertake to compel agreement between the employer and employees, but it does command those preliminary steps without which no agreement can be reached. It at least requires the employer to meet and confer with the authorized representative of its employees, to listen to their complaints, to make reasonable effort to compose differences—in short, to enter into a negotiation for the settlement of labor disputes such as is contemplated by § 2, First.

Petitioner's insistence that the statute does not warrant so much of the decree as forbids it to enter into contracts of employment with its individual employees is based upon a misconstruction of the decree. Both the statute and the decree are aimed at securing settlement of labor disputes by inducing collective bargaining with the true representative of the employees and by preventing such bargaining with any who do not represent them. The obliga-

Board but nine times in six years, see testimony of William M. Leiserson, Chairman of National Mediation Board until February 1, 1937, at Hearing by National Labor Relations Board in the case of Jones & Laughlin Steel Corp. [No. 419, October Term, 1936]; Governmental Protection of Labor's Right to Organize, National Labor Relations Board, Division of Economic Research, Bull. No. 1, August, 1936, p. 50. The 1934 amendment was followed by a large increase in the number of representation disputes submitted to the National Mediation Board. See *infra*, Note 7.

tion imposed on the employer by § 2, Ninth, to treat with the true representative of the employees as designated by the Mediation Board, when read in the light of the declared purposes of the Act, and of the provisions of § 2, Third and Fourth, giving to the employees the right to organize and bargain collectively through the representative of their own selection, is exclusive. It imposes the affirmative duty to treat only with the true representative, and hence the negative duty to treat with no other. We think, as the Government concedes in its brief,[6] that the injunction against petitioner's entering into any contract concerning rules, rates of pay and working conditions, except with respondent, is designed only to prevent collective bargaining with anyone purporting to represent employees, other than respondent, who has been ascertained to be their true representative. When read in its context it must be taken to prohibit the negotiation of labor contracts, generally applicable to employees in the mechanical department, with any representative other than respondent, but not as precluding such individual contracts as petitioner may elect to make directly with individual employees. The decree, thus construed, conforms, in both its affirmative and negative aspects, to the requirements of § 2.

Propriety of Relief in Equity. Petitioner contends that if the statute is interpreted as requiring the employer to negotiate with the representative of his employees, its obligation is not the appropriate subject of a decree in equity; that negotiation depends on desires and mental attitudes which are beyond judicial control, and that since equity cannot compel the parties to agree, it will not compel them to take the preliminary steps which may result in agreement.

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[6] (Note 35a.) "The Government interprets the negative obligations imposed by the statute and decree as having the following effect:

"When the majority of a craft or class has (either by secret ballot or otherwise) selected a representative, the carrier cannot make with anyone other than the representative a collective contract (i. e., a contract which sets rates of pay, rules, or working conditions), whether the contract covers the class as a whole or a part thereof. Neither the statute nor the decree prevents the carrier from refusing to make a collective contract and hiring individuals on whatever terms the carrier may by unilateral action determine. In hirings of that sort the individual does not deal in a representative capacity with the carrier and the hiring does not set general rates of pay, rules, or working conditions. Of course, as a matter of voluntary action, not as a result of the statute or the decree, the carrier may contract with the duly designated representative to hire individuals only on the terms of a collective understanding between the carrier and the representative; but any such agreement would be entirely voluntary on the carrier's part and would in no sense be compelled.

"If the majority of a craft or class has not selected a representative, the carrier is free to make with anyone it pleases and for any group it pleases contracts establishing rates of pay, rules, or working conditions."

There is no want of capacity in the court to direct complete performance of the entire obligation: both the negative duties not to maintain a company union and not to negotiate with any representative of the employees other than respondent and the affirmative duty to treat with respondent. Full performance of both is commanded by the decree in terms which leave in no uncertainty the requisites of performance. In compelling compliance with either duty it does far less than has been done in compelling the discharge of a contractual or statutory obligation calling for a construction or engineering enterprise, *New Orleans, Mobile & Texas Ry. Co.* v. *Mississippi*, 112 U. S. 12; *Wheeling Traction Co.* v. *Board of Comm'rs.*, 248 Fed. 205; see *Gas Securities Co.* v. *Antero & Lost Park Reservoir Co.*, 259 Fed. 423, 433; *Board of Comm'rs* v. *A. V. Wills & Sons*, 236 Fed. 362, 380; *Jones* v. *Parker*, 163 Mass. 564, or in granting specific performance of a contract for the joint use of a railroad bridge and terminals, *Joy* v. *St. Louis*, 138 U. S. 1; *Union Pacific Ry. Co.* v. *Chicago, R. I. & P. Ry. Co.*, 163 U. S. 564; cf. *Prospect Park & Coney Island R. Co.* v. *Coney Island & Brooklyn R. Co.*, 144 N. Y. 152. Whether an obligation has been discharged, and whether action taken or omitted is in good faith or reasonable, are everyday subjects of inquiry by courts in framing and enforcing their decrees.

It is true that a court of equity may refuse to give any relief when it is apparent that that which it can give will not be effective or of benefit to the plaintiff. Equity will not decree the execution of a partnership agreement since it cannot compel the parties to remain partners, see *Hyer* v. *Richmond Traction Co.*, 168 U. S. 471, 482, or compel one to enter into performance of a contract of personal service which it cannot adequately control, *Marble Company* v. *Ripley*, 10 Wall. 339, 358; *Karrick* v. *Hannaman*, 168 U. S. 328, 336; *Tobey* v. *Bristol*, Fed. Cas. No. 14,065; *Weeks* v. *Pratt*, 43 F. (2d) 53, 57; Railway Labor Act, § 2, Tenth. But the extent to which equity will go to give relief where there is no adequate remedy at law is not a matter of fixed rule. It rests rather in the sound discretion of the court. *Willard* v. *Tayloe*, 8 Wall. 557, 565; *Joy* v. *St. Louis, supra*, 47; *Morrison* v. *Work*, 266 U. S. 481, 490; *Curran* v. *Holyoke Water Power Co.*, 116 Mass. 90, 92. Whether the decree will prove so useless as to lead a court to refuse to give it, is a matter of judgment to be exercised with reference to the special circumstances of each case rather than to general

rules which at most are but guides to the exercise of discretion. It is a familiar rule that a court may exercise its equity powers, or equivalent mandamus powers, *United States ex rel. Greathouse v. Dern*, 289 U. S. 352, 359, to compel courts, boards, or officers to act in a matter with respect to which they may have jurisdiction or authority, although the court will not assume to control or guide the exercise of their authority. *Interstate Commerce Commission v. Humboldt S. S. Co.*, 224 U. S. 474; *Louisville Cement Co. v. Interstate Commerce Commission*, 246 U. S. 638; see *Work v. United States ex rel. Rives*, 267 U. S. 175, 184; *Wilbur v. United States ex rel. Kadrie*, 231 U. S. 206, 218.

In considering the propriety of the equitable relief granted here, we cannot ignore the judgment of Congress, deliberately expressed in legislation, that where the obstruction of the company union is removed, the meeting of employers and employees at the conference table is a powerful aid to industrial peace. Moreover, the resources of the Railway Labor Act are not exhausted if negotiation fails in the first instance to result in agreement. If disputes concerning changes in rates of pay, rules or working conditions, are "not adjusted by the parties in conference," either party may invoke the mediation services of the Mediation Board, § 5, First, or the parties may agree to seek the benefits of the arbitration provision of § 7. With the coercive influence of the company union ended, and in view of the interest of both parties in avoiding a strike, we cannot assume that negotiation, as required by the decree, will not result in agreement, or lead to successful mediation or arbitration, or that the attempt to secure one or another through the relief which the district court gave is not worth the effort.

More is involved than the settlement of a private controversy without appreciable consequences to the public. The peaceable settlement of labor controversies, especially where they may seriously impair the ability of an interstate rail carrier to perform its service to the public, is a matter of public concern. That is testified to by the history of the legislation now before us, the reports of committees of Congress having the proposed legislation in charge, and by our common knowledge. Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved. *Pennsylvania* v. *Wil-*

liams, 294 U. S. 176, 185; *Central Ky. Natural Gas Co.* v. *Railroad Commission of Kentucky,* 290 U. S. 264, 270-273; *Harrisonville* v. *W. S. Dickey Clay Co.,* 289 U. S. 334, 338; *Beasley* v. *Texas & Pac. Ry. Co.,* 191 U. S. 492, 497; *Joy* v. *St. Louis, supra,* 47; *Texas & Pac. Ry. Co.* v. *Marshall,* 136 U. S. 393, 405-406; *Conger* v. *New York, West Shore & Buffalo R. Co.,* 120 N. Y. 29, 32, 33. The fact that Congress has indicated its purpose to make negotiation obligatory is in itself a declaration of public interest and policy which should be persuasive in inducing courts to give relief. It is for similar reasons that courts, which traditionally have refused to compel performance of a contract to submit to arbitration, *Tobey* v. *Bristol, supra,* enforce statutes commanding performance of arbitration agreements. *Red Cross Line* v. *Atlantic Fruit Co.,* 264 U. S. 109, 119, 121; *Maritime Transit Co.* v. *Dreyfus,* 284 U. S. 263, 278.

The decree is authorized by the statute and was granted in an appropriate exercise of the equity powers of the court.

Second. Constitutionality of § 2 of the Railway Labor Act. (*A*) *Validity Under the Commerce Clause:* The power of Congress over interstate commerce extends to such regulations of the relations of rail carriers to their employees as are reasonably calculated to prevent the interruption of interstate commerce by strikes and their attendant disorders. *Wilson* v. *New,* 243 U. S. 332, 347-348. The Railway Labor Act, § 2, declares that its purposes, among others, are "To avoid any interruption to commerce or to the operation of any carrier engaged therein," and "to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules or working conditions." The provisions of the Act and its history, to which reference has been made, establish that such are its purposes, and that the latter is in aid of the former. What has been said indicates clearly that its provisions are aimed at the settlement of industrial disputes by the promotion of collective bargaining between employers and the authorized representative of their employees, and by mediation and arbitration when such bargaining does not result in agreement. It was for Congress to make the choice of the means by which its objective of securing the uninterrupted service of interstate railroads was to be secured, and its judgment, supported as it is by our long experience with industrial disputes, and the history of railroad labor relations, to which we have referred, is

not open to review here.[7] The means chosen are appropriate to the end sought and hence are within the congressional power. See *Railway Clerks* case, *supra*, 570; *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, 369.

But petitioner insists that the Act as applied to its "back shop" employees is not within the commerce power since their duties have no direct relationship to interstate transportation. Of the 824 employees in the six shop crafts eligible to vote for a choice of representatives, 322 work in petitioner's "back shops" at Princeton, West Virginia. They are there engaged in making classified repairs, which consist of heavy repairs on locomotives and cars with-

[7] There was evidence available to Congress that the labor policy embodied in the Railway Labor Act had been successful in curbing strikes. In the eight years subsequent to the passage of the 1926 Act, there were only two small railroad strikes. Since the 1934 amendment, there has been but one. See National Mediation Board, First Annual Report, For the Fiscal Year Ended June 30, 1935, p. 8; Second Annual Report, For the Fiscal Year Ended June 30, 1936, p. 1.

In the water transportation and motor transportation fields, there were frequent strikes. A table submitted by the United States [see Respondent's Brief, Associated Press *v.* National Labor Relations Board, No. 365, October Term 1936, p. 57], and derived from United States Department of Labor, Bureau of Labor Statistics, Bulletins No. R. 339 (1936), p. 4; No. R. 389 (1936), p. 4; Monthly Labor Review (May-September, 1936), Monthly "Analysis of Strikes," shows the following:

	Man-days of idleness due to labor strikes.			
	1933	1934	1935	(1936 Jan.-May)
Water Transportation....	32,752	1,068,867	749,534	119,820
Motor Transportation.....	155,565	859,657	202,393	46,054
Railroads	0	0	56	0

Yet there were many disputes between rail carriers and their employees. Apart from the more trivial grievances and differences of opinion in the interpretation of agreements, 876 disputes, principally over changes in rates of pay, rules or working conditions, were referred to the United States Board of Mediation between 1926 and 1934. The following table, derived from its Eighth Annual Report, For the Fiscal Year Ended June 30, 1934, pp. 4-5, indicates the success of the mediation and arbitration machinery set up by the Railway Labor Act.

	Fiscal Year Ending June 30, —								
Manner of Disposition	1927	1928	1929	1930	1931	1932	1933	1934	Total
Mediation Agreements....	57	84	46	25	24	45	23	17	321
Withdrawn by Parties....	24	45	43	20	21	69	20	26	268
Arbitration Agreements...	27	14	10	4	2	4	3	9	73
Closed Account: Refusal to Arbitrate....	0	0	9	3	1	47	39	50	149
Retired or closed, other causes	3	2	21	10	5	5	10	9	65

But statistics show that many more labor disputes were settled by direct negotiation, *supra*, footnote 4, and Congress might reasonably have feared that

drawn from service for that purpose for long periods (an average of 105 days for locomotives and 109 days for cars). The repair work is upon the equipment used by petitioner in its transportation service, 97% of which is interstate. At times a continuous stream of engines and cars passes through the "back shops" for such repairs. When not engaged in repair work, the back shop employees perform "store order work," the manufacture of material such as rivets and repair parts, to be placed in railroad stores for use at the Princeton shop and other points on the line.

The activities in which these employees are engaged have such a relation to the other confessedly interstate activities of the petitioner that they are to be regarded as a part of them. All taken together fall within the power of Congress over interstate commerce. *Baltimore & Ohio R. Co.* v. *Interstate Commerce Commission*, 221 U. S. 612, 619; cf. *Pedersen* v. *Delaware, Lackawanna & Western R. Co.*, 229 U. S. 146, 151. Both courts below have found that interruption by strikes of the back shop employees, if more than temporary, would seriously cripple petitioner's interstate transportation. The relation of the back shop to transportation is such that a strike of petitioner's employees there, quite apart from the likelihood of its spreading to the operating department, would subject petitioner to the danger, substantial, though possibly indefinable in its extent, of interruption of the transportation service. The cause is not remote from the effect. The relation between them is not tenuous. The effect on commerce cannot be regarded as negligible. See *United States*

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the action of certain railroads in negotiating only with unions dominated by them would prevent such settlements and lead to strikes. See *supra*, footnote 5. That there were many disputes, apparent and latent, for which the 1926 Act had not provided adequate machinery, is shown by the large number of representation disputes (more than 230) referred to the National Mediation Board in the first two years of its existence, see First Annual Report, For the Fiscal Year Ended June 30, 1935, p. 9; Second Annual Report, For the Fiscal Year Ended June 30, 1936, pp. 5, 7.

It is the belief of the National Mediation Board that peace in the railroad industry is largely due to the 3,485 collective agreements covering rates of pay, rules and working conditions, which were filed by June 30, 1936 [see National Mediation Board, Second Annual Report, For the Fiscal Year Ended June 30, 1936, p. 26]. In its First Annual Report, For the Fiscal Year Ended June 30, 1935, it concluded (p. 36): "The absence of strikes in the railroad industry, particularly during the last two years when wide-spread strikes, the usual accompaniment of business recovery, prevailed throughout the country, is to be explained primarily not by the mediation machinery of the Railway Labor Act, but by the existence of these collective labor contracts. For, while they are in existence, these contracts provide orderly, legal processes of settling all disputes as a substitute for strikes and industrial warfare."

v. *Railway Employees Department of the American Federation of Labor*, 290 Fed. 978, 981, holding participation of back shop employees in the nation-wide railroad shopmen's strike of 1922 to constitute an interference with interstate commerce. As the regulation here in question is shown to be an appropriate means of avoiding that danger, it is within the power of Congress.

It is no answer, as petitioner suggests, that it could close its back shops and turn over the repair work to independent contractors. Whether the railroad should do its repair work in its own shops, or in those of another, is a question of railroad management. It is petitioner's determination to make its own repairs which has brought its relations with shop employees within the purview of the Railway Labor Act. It is the nature of the work done and its relation to interstate transportation which afford adequate basis for the exercise of the regulatory power of Congress.

The Employers' Liability Cases, 207 U. S. 463, 498, which mentioned railroad repair shops as a subject beyond the power to regulate commerce, are not controlling here. Whatever else may be said of that pronouncement, it is obvious that the commerce power is as much dependent upon the type of regulation as its subject matter. It is enough for present purposes that experience has shown that the failure to settle, by peaceful means, the grievances of railroad employees with respect to rates of pay, rules or working conditions, is far more likely to hinder interstate commerce than the failure to compensate workers who have suffered injury in the course of their employment.

(*B*) *Validity of § 2 of the Railway Labor Act Under the Fifth Amendment.* The provisions of the Railway Labor Act applied in this case, as construed by the court below, and as we construe them, do not require petitioner to enter into any agreement with its employees, and they do not prohibit its entering into such contract of employment as it chooses, with its individual employees. They prohibit only such use of the company union as, despite the objections repeated here, was enjoined in the *Railway Clerks* case, *supra*, and they impose on petitioner only the affirmative duty of "treating with" the authorized representatives of its employees for the purpose of negotiating a labor dispute.

Even though Congress, in the choice of means to effect a permissible regulation of commerce, must conform to due process, *Railroad Retirement Board* v. *Alton R. Co.*, *supra*, 347; *Chicago, R. I. &*

P. Ry. Co. v. *United States,* 284 U. S. 80, 97; see *Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555, 589, it is evident that where, as here, the means chosen are appropriate to the permissible end, there is little scope for the operation of the due process clause. The railroad can complain only of the infringement of its own constitutional immunity, not that of its employees. *Erie R. Co.* v. *Williams,* 233 U. S. 685, 697; *Jeffrey Mfg. Co.* v. *Blagg,* 235 U. S. 571, 576; *Rail Coal Co.* v. *Ohio Ind. Comm.,* 236 U. S. 338, 349; cf. *Hawkins* v. *Bleakly,* 243 U. S. 210, 214. And the Fifth Amendment, like the Fourteenth, see *West Coast Hotel Co.* v. *Parrish,* No. 293, decided this day, is not a guarantee of untrammeled freedom of action and of contract. In the exercise of its power to regulate commerce, Congress can subject both to restraints not shown to be unreasonable. Such are the restraints of the safety appliance act, *Johnson* v. *Southern Pac. Co.,* 196 U. S. 1; of the act imposing a wage scale on rail carriers, *Wilson* v. *New, supra;* of the Railroad Employers' Liability Act, *Second Employers' Liability Cases,* 223 U. S. 1; of the act fixing maximum hours of service for railroad employees whose duties control or affect the movement of trains, *Baltimore & Ohio R.* v. *Interstate Commerce Commission, supra;* of the act prohibiting the prepayment of seamen's wages, *Patterson* v. *Bark Eudora,* 190 U. S. 169.

Each of the limited duties imposed upon petitioner by the statute and the decree do not differ in their purpose and nature from those imposed under the earlier statute and enforced in the *Railway Clerks* case, *supra.* The quality of the action compelled, its reasonableness, and therefore the lawfulness of the compulsion, must be judged in the light of the conditions which have occasioned the exercise of governmental power. If the compulsory settlement of some differences, by arbitration, may be within the limits of due process, see *Hardware Dealers Mutual Fire Ins. Co.* v. *Glidden Co.,* 284 U. S. 151, it seems plain that the command of the statute to negotiate for the settlement of labor disputes, given in the appropriate exercise of the commerce power, cannot be said to be so arbitrary or unreasonable as to infringe due process.

Adair v. *United States,* 208 U. S. 161, and *Coppage* v. *Kansas,* 236 U. S. [illegible] ave no present application. The provisions of the Railway Labor Act invoked here neither compel the employer to enter into any agreement, nor preclude it from entering into any contract with individual employees. They do not "interfere with

the normal exercise of the right of the carrier to select its employees or to discharge them." See the *Railway Clerks* case, *supra*, 571.

There remains to be considered petitioner's contentions that the certificate of the National Mediation Board is invalid and that the injunction granted is prohibited by the provisions of the Norris-LaGuardia Act, of March 23, 1932, c. 90, 47 Stat. 70; 29 U. S. C. §§ 101-115.

Validity of the Certificate of the National Mediation Board. In each craft of petitioner's mechanical department a majority of those voting cast ballots for the Federation. In the case of the blacksmiths the Federation failed to receive a majority of the ballots of those eligible to vote, although a majority of the craft participated in the election. In the case of the carmen and coach cleaners, a majority of the employees eligible to vote did not participate in the election. There has been no appeal from the ruling of the district court that the designation of the Federation as the representative of the carmen and coach cleaners was invalid. Petitioner assails the certification of the Federation as the representative of the blacksmiths because less than a majority of that craft, although a majority of those voting, voted for the Federation.

Section 2, Fourth, of the Railway Labor Act provides: "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act." Petitioner construes this section as requiring that a representative be selected by the votes of a majority of eligible voters. It is to be noted that the words of the section confer the right of determination upon a majority of those eligible to vote, but is silent as to the manner in which that right shall be exercised. Election laws providing for approval of a proposal by a specified majority of an electorate have been generally construed as requiring only the consent of the specified majority of those participating in the election. *Carroll County* v. *Smith*, 111 U. S. 556; *Douglas* v. *Pike County*, 101 U. S. 677; *Louisville & Nashville R. Co.* v. *County Court of Davidson County*, 1 Sneed. (Tenn.) 637; *Montgomery County Fiscal Court* v. *Trimble*, 104 Ky. 629. Those who do not participate "are presumed to assent to the expressed will of the majority of those voting." *County of Cass* v. *Johnston*, 95 U. S. 360, 369, and see *Carroll County* v. *Smith*, *supra*.

We see no reason for supposing that § 2, Fourth, was intended to adopt a different rule. If, in addition to participation by a majority of a craft, a vote of the majority of those eligible is necessary for a choice, an indifferent minority could prevent the resolution of a contest, and thwart the purpose of the Act, which is dependent for its operation upon the selection of representatives. There is the added danger that the absence of eligible voters may be due less to their indifference than to coercion by the employer. The opinion of the trial court discloses that the Mediation Board scheduled an election to be determined by a majority of the eligible voters, but that the Federation's subsequent protest that the Railway was influencing the men not to vote caused the Board to hold a new election to be decided by the ballots of a majority of those voting.

It is significant of the congressional intent that the language of § 2, Fourth, was taken from a rule announced by the United States Railroad Labor Board, acting under the labor provisions of the Transportation Act of 1920, Decision No. 119, *International Association of Machinists, et al.* v. *Atchison, Topeka & Santa Fe Ry., et al.*, 2 Dec. U. S. Railroad Labor Board, 87, 96, par. 15. Prior to the adoption of the Railway Labor Act, this rule was interpreted by the Board, in Decision No. 1971, *Brotherhood of Railway & S. S. Clerks* v. *Southern Pacific Lines*, 4 Dec. U. S. Railroad Labor Board 625, where it appeared that a majority of the craft participated in the election. The Board ruled, p. 639, that a majority of the votes cast was sufficient to designate a representative. A like interpretation of § 2, Fourth, was sustained in *Association of Clerical Employees* v. *Brother of Railway & S. S. Clerks*, 85 F. (2d) 152.

The petitioner also challenges the validity of the certificate of the National Mediation Board in this case because it fails to state the number of eligible voters in each craft or class. The certificate states that respondent "has been duly designated and authorized to represent the mechanical department employees" of petitioner. It also shows on its face the total number of votes cast in each craft in favor of each candidate, but omits to state the total number of eligible voters in each craft. Petitioner insists that this is a fatal defect in the certificate, upon the basis of those cases which hold that where a finding of fact of an administrative officer or tribunal is prerequisite to the making of a rule or order, the finding must be explicitly set out. See *Panama Refining Co.* v. *Ryan*,

293 U. S. 388; *United States* v. *Chicago, Milwaukee, St. Paul & P. R. Co.*, 294 U. S. 499; *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 295 U. S. 193.

The practice contended for is undoubtedly desirable, but it is not required by the present statute or by the authorities upon which petitioner relies. The National Mediation Board makes no order. The command which the decree of the court enforces is that of the statute, not of the Board. Its certificate that the Federation is the authorized representative of the employees is the ultimate finding of fact prerequisite to enforcement by the courts of the command of the statute. There is no contention that this finding is conclusive in the absence of a finding of the basic facts on which it rests—that is to say, the number of eligible voters, the number participating in the election and the choice of the majority of those who participate. Whether the certification, if made as to those facts, is conclusive, it is unnecessary now to determine. But we think it plain that if the Board omits to certify any of them, the omitted fact is open to inquiry by the court asked to enforce the command of the statute. See *Dismuke* v. *United States*, 297 U. S. 167, 171-173. Such inquiry was made by the trial court, which found the number of eligible voters and thus established the correctness of the Board's ultimate conclusion. The certificate, which conformed to the statutory requirement, was *prima facie* sufficient, and was not shown to be invalid for want of the requisite supporting facts.

Validity of the Injunction Under the Norris-LaGuardia Act. Petitioner assails the decree for its failure to conform to the requirements of § 9 of the Norris-LaGuardia Act, which provides: "every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or actions as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in . . . findings of fact made and filed by the court." The evident purpose of this section, as its history and context show, was not to preclude mandatory injunctions, but to forbid blanket injunctions against labor unions, which are usually prohibitory in form, and to confine the injunction to the particular acts complained of and found by the court. We deem it unnecessary to comment on other similar objections, except to say that they are based on strained and unnatural constructions of the words of the

Norris-LaGuardia Act, and conflict with its declared purpose, § 2, that the employee "shall be free from interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or profection."

It suffices to say that the Norris-LaGuardia Act can affect the present decree only so far as its provisions are found to conflict with those of § 2, Ninth, of the Railway Labor Act, authorizing the relief which has been granted. Such provisions cannot be rendered nugatory by the earlier and more general provisions of the Norris-LaGuardia Act. See the *Railway Clerks* case, *supra*, 571; cf. *Callahan* v. *United States*, 285 U. S. 515, 518; *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1, 22; *International Alliance* v. *Rex Theatre Corp.*, 73 F. (2d) 92, 93.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.